United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

JOINT APPENDIX

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,889

GULF OIL CORP.,
Appellant,

v.

ERNEST E. REED, as Administrator of the Estate of Dwight K. Reed, deceased,
Appellee.

Appeal from the United States District Court for the District of Columbia

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WILSON - EPES PRINTING CO. - RE 7-6002 - WASHINGTON 1, D. C.

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RELEVANT DOCKET ENTRIES

* * * *

1961	Deposit for cost by	
Mar. 13	Complaint, appearance Jury Demand	

* * * *

Apr. 4	Answer of defts to complaint; * * *	

* * * *

1963		
Jan. 10	Pretrial Proceedings	Pretrial Examiner
Jan. 14	List of witnesses by pltff. c/m 1-14-63.	
Mar. 20	Jury & two alternates sworn; trial begun and respited until 3-21-63; Holtzoff, J. * * *	
Mar. 25	Trial resumed; same jury and alternate jurors; motion of deft for directed verdict against pltff on count one of complaint, heard and granted; trial respited until March 26, 1963. * * * Holtzoff, J.	
Mar 26	Trial resumed; same jury and alternate jurors; alternate jurors discharged; verdict for pltf in sum of $20,000.00. * * * Holtzoff, J.	
Mar 26	Notes from jury. * * *	
Mar 26	Instructions of pltf. * * *	
Mar 26	Instructions of deft. * * *	
Mar 26	Verdict and judgment in favor of pltf v deft in sum of $20,000.00 plus costs * * *	
Mar 21	Trial resumed; same jury and alternates; trial respited to 3-25-63; * * *	
Mar 28	Motion of deft. for reduction of verdict; to set aside judgment or for a new trial, * * *	

* * * *

Apr 24	Notice of appeal by deft. * * *	

* * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Division

Civil Action No. 766-61

ERNEST E. REED, as Administrator of the Estate of Dwight K. Reed, deceased, 319 "E" Street Southeast Washington, D. C.

Plaintiff

vs.

GULF OIL CORP. a corporation 1724 S. Capitol Street Washington, D. C.

and

HARRY R. BLOCK 3405 - 24th Street Southeast Washington, D. C.

Defendants.

COMPLAINT

COUNT I

(For Damages for Personal Injuries Under the Survival Act)

1. Jurisdiction is had in this cause in that the amount in controversy exceeds the sum of Three Thousand ($3,000.00) Dollars, exclusive of Court costs.

2. Plaintiff ERNEST E. REED is an adult citizen of the United States and a resident of the District of Columbia and brings this action as the duly appointed administrator of the estate of Dwight K. Reed, deceased, having been so appointed by the United States District Court for the District of Columbia, holding a Probate Court, Administration No. 101,525, and as such administrator brings his letters of administration into this Court for the purpose of this action.

3. The defendant GULF OIL CORP. is a body corporate which on August 23, 1960 and for some time prior was engaged in business and had offices and agents in the District of Columbia and in connection with said business owned and operated and controlled a certain pick up truck hereinafter mentioned.

4. The defendant HARRY R. BLOCK is an adult citizen of the United States and a resident of the District of Columbia.

5. On August 23, 1960, the decedent, Dwight K. Reed, was a minor pedestrian, seven years of age, in the act of crossing New Jersey Avenue Southeast, from the west to the east curb, within the 600 block thereof, when he was violently collided into and struck by a truck owned by the defendant, GULF OIL CORP. and being operated by the defendant HARRY R. BLOCK, proceeding north on New Jersey Avenue at said time and place.

6. The defendant, HARRY R. BLOCK, at said time and place was operating the defendant corporation's truck with the knowledge and consent of said defendant, GULF OIL CORP., and as an agent and employee of said defendant corporation.

7. The defendants, individually or by its agent and employee, were reckless, careless and negligent in the operation, management and control of said truck: failed to give full time and attention to the operation of same; failed to keep a proper lookout ahead; proceeded at an excessive rate of speed under the circumstances; failed to keep said truck under proper control to avoid colliding into minor decedent; and violated the traffic rules and regulations of the District of Columbia then in force of law. Plaintiff also relies on the doctrine of "last clear chance".

8. By reason of the defendants' negligence aforesaid. minor Dwight K. Reed sustained serious and permanent injuries to his person; he sustained a very extensive frac-

ture of the skull with marked separation of the fragments and extensive brain damage; a fracture of both bones of the right leg in the mid-third; extensive abrasions about his head, face, body and extremities; and shock to his nervous system.

9. Plaintiff avers that the wrongful and negligent acts of the defendant in causing personal injuries to the decedent were such that if death had not ensued, would have entitled the decedent to maintain an action to recover damages against the defendant during his lifetime, and that no such action to recover damages was instituted during his lifetime.

10. The decedent, Dwight K. Reed, died on August 23, 1960 as a result of the injuries aforementioned.

WHEREFORE, plaintiff ERNEST E. REED, administrator of the estate of Dwight K. Reed, deceased, demands judgment against the defendants, one or both, in the amount of Fifty Thousand ($50,000.00) Dollars, together with the costs of this action.

COUNT II

For Damages for Wrongful Death

11. Plaintiff repeats, reiterates and realleges each and every paragraph of this Complaint numbered "1" to "7" inclusive with the same force and effect as if again set forth here at length.

12. As a result of the defendants' negligence aforesaid, the decedent sustained serious and permanent injuries to his person, from which injuries inflicted upon him by defendants he suffered great pain until his death and which injuries caused his death on August 23, 1960.

13. Plaintiff avers that the wrongful and negligent acts of the defendants in causing the death of decedent were such that if death had not ensued, would have entitled the

decedent to maintain an action to recover damages against the defendants during his lifetime and that no such action to recover damages was instituted during his lifetime.

14. As a result of the wrongful death of the decedent, his parents, Ernest E. Reed and Thomasine Reed, have been and will be deprived of services, society and financial aid of their said son, now and in the future.

15. The administrator of the decedent's estate has incurred expenses for the funeral and burial of the decedent.

WHEREFORE, plaintiff ERNEST E. REED, as administrator of the estate of Dwight K. Reed, deceased, for the benefit of his next of kin demands judgment against the defendants, one or both, in the amount of Seventy-five Thousand ($75,000.00) Dollars, together with the costs of this action, in accordance with the statute in said case made and provided.

FRANKLYN YASMER & STANLEY A. FIRST

By: /s/ Franklyn Yasmer
Attorneys for Plaintiff
917 - 15th Street Northwest
Washington 5, D. C.

JURY DEMAND

Plaintiff, by his attorneys, demands a TRIAL BY JURY of the foregoing action.

/s/ Franklyn Yasmer

* * * *

ANSWER OF BOTH DEFENDANTS

First Defense

The complaint fails to state a cause of action entitling the plaintiff to relief.

Second Defense

1. Defendants admit the allegations in paragraph 2. of the complaint.

2. Defendants admit that on August 23, 1960, a truck owned by the corporate defendant and operated by its employee, defendant Harry R. Block, was in collision with the plaintiff's decedent in the 600 block of New Jersey Avenue, S. E., and that as a result of said collision the plaintiff's decedent died.

3. Defendants deny that the death of the plaintiff's decedent resulted from any negligence or carelessness on their part which proximately contributed thereto.

4. Defendants deny each and every other allegation of the complaint not herein specifically answered.

Third Defense

The death of the plaintiff's decedent resulted from the decedent's sole or contributory negligence.

HOGAN & HARTSON

By /s/ Paul R. Connolly
PAUL R. CONNOLLY

* * * *

* * * *

PLAINTIFF'S PRE-TRIAL STATEMENT

Occurrence: Count I is an action for damages for personal injuries, sustained by minor decedent, under the Survival Act. On August 23, 1960, Dwight K. Reed, the decedent, was a minor seven years of age, in the act of crossing New Jersey Avenue Southeast from the west to the east curb, within the 600 block thereof, when he was violently collided into and struck by a truck owned by the defendant Gulf Oil Corp. and being operated by defendant Harry R. Block, proceeding north on New Jersey Avenue. The defendant Block was operating the aforesaid truck with the knowledge and consent of the defendant Gulf Oil Corp. and as an agent and employee of said defendant. Said minor sustained fatal injuries and died the same day.

Count II is an action for wrongful death based on the occurrence described above.

Liability: Failed to give full time and attention to the operation of said truck;

Failed to keep a proper lookout ahead;

Proceeded at an excessive rate of speed under the circumstances;

Failed to keep said truck under proper control to avoid colliding with minor pedestrian Dwight K. Reed;

Violated the traffic rules and regulations of the District of Columbia;

Plaintiff also invokes the doctrine of "last clear chance."

* * * *

* * * *

LIST OF WITNESSES

Ernest E. Reed	5270 Chillum Place Northeast
James W. Bramhall	A.I.U., Metropolitan Police Department
Charles R. Kinkaid	76 Forrester Street Southwest, Apt. 104
Nathan Wood, Jr.	311 E Street Southeast
Larry Brox	316 South Carolina Avenue Southeast
Robert L. Simpson	332 E Street Southeast
Louis B. Sims	A.I.U., Metropolitan Police Department
Coroner	D.C. Coroner's Office 19 & E Street Southeast

FRANKLYN YASMER & STANLEY A. FIRST

By: /s/ Stanley A. First

* * * *

DEFENDANTS' PRETRIAL STATEMENT

Defendants admit that on August 23, 1960, a truck owned by the corporate defendant and operated by its employee Harry R. Block was in collision with the plaintiff's decedent, Dwight K. Reed in the 600 block of New Jersey Avenue, S.E., Washington, D.C. The defendants deny negligence and assert that the accident was the result of the sole or contributory negligence of the plaintiff's decedent in running out in front of the truck, in not crossing at a crosswalk, in deliberately running in front of the truck in an attempt to beat it, in not yielding the right of way to the truck, in darting out from a protected area when the truck was so close that the driver could not stop, in playing in the street and in failing to allow the truck to pass, violated §§ 52(a), 52(c), 53(a) and possibly § 57 of the Traffic & Motor Vehicle Regulations of the District of Columbia.

* * * *

PRE-TRIAL ORDER

REED
GULF OIL, et al.

766-61

January 10, 1963

Action for damages for personal injuries under the Survival Act, and for wrongful death.

THE PARTIES AGREE TO THE FOLLOWING STATEMENT OF FACTS, AND STIPULATE THERETO: P is the duly appointed and qualified administrator of the Estate of Dwight K. Reed, who died Aug. 23, 1960. On said day at about 2:25 p.m. decedent was involved in a collision with a truck owned by corporate D and operated by its employee, Harry R. Block, on its business,

while said vehicle was travelling north on New Jersey, S.E., Wash., D.C. within the 600 block thereof. Decedent was crossing N.J. Ave. from west to east. Weather clear, streets dry.

PLAINTIFF CLAIMS that the decedent was 7 years of age; that he left surviving his parents, the P and his mother, and that he sustained fatal injuries in the collision. P asserts that the accident, the injuries to decedent, and the death and the damages claimed herein were caused by negligence of and violations of D.C. Traffic Regulations by the operator of the D, Gulf Oil's truck, in that the operator failed to give full time and attention to operation of said truck (99c); failed to keep a proper lookout; operating at an excessive rate of speed under the circumstances (22a); failed to keep said truck under such control as to avoid colliding with a pedestrian (52 and 54).

P also revokes the doctrine of last clear chance.

DEFENDANTS deny any negligence or violations of D. C. Traffic Regulations and asserts that the accident was the result of the sole or contributory negligence of or violations of D.C. Traffic Regulations by P's decedent in running out in front of the truck; in not crossing the street at a crosswalk; in deliberately running in front of a truck in an attempt to beat it; in not yielding the right-of-way to the truck; in darting out from a protected area when the truck was so close that the driver could not stop; in playing in the street; and in failing to allow the truck to pass. (Sections 52, 52c, 53a, 57).

* * * *

SPECIAL DAMAGES: John T. Rhines & Co. $723.40
Funeral of decedent

* * * *

* * * *

PROCEEDINGS

5 MR. YASMIR: And we stand on the doctrine of the last clear chance. We press that.

THE COURT: I understand, but I want to know how you propose to apply the doctrine of the last clear chance. I see all that in the pretrial order.

MR. YASMIR: I think the evidence will show that even if this yongster, whatever negligence this Court can hold him accountable for at the age of seven, the driver of the truck had a chance to overcome his negligence.

THE COURT: How?

MR. YASMIR: Because he could see him for a distance if he kept a proper lookout.

THE COURT: For how long a distance?

MR. YASMIR: He had a chance to see him.

THE COURT: For how long a distance, approximately? In other words, I want to know what the parties contend.

MR. YASMIR: Yes, for practically a distance the length of the bridge, maybe one-hundred fifty to one hundred seventy-five feet. This man put down ninety-
6 three feet six inches of skid marks, unmistakable skid marks.

* * * *

7 THE COURT: What is your position in respect to Mr. Yasmir's contention that the driver could have seen him 150 feet away?

MR. ARNESS: There is no evidence to that effect.

THE COURT: What about the contention that the driver was going thirty-five miles an hour in a twenty-five mile zone?

MR. ARNESS: His testimony will be that he wasn't going quite that fast, Your Honor, but we will take the position that speed is immaterial in this case where

8 they are relying on the doctrine of last clear chance.

THE COURT: Oh, no. Speed is very material. It is material because some of the most serious accidents are caused because people go too fast. If you go slowly enough, even if you have an accident, you do not hurt anybody very badly. I just want to know your position so that we can clarify the issues.

Now, I am going to suggest this, Mr. Yasmir, that you put in all your evidence on the issue of liability first before putting in evidence of damages.

* * * *

PLAINTIFF'S OPENING STATEMENT

* * * *

9-B We will show you further, and I feel convince you, that with five children all around that bridge, which he could have easily seen and which the evidence will show he did not see at all, he didn't see any thing until he was a couple of feet from this boy, this young lad.

* * * *

9-C ERNEST E. REED

was called as a witness for the plaintiff and, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. YASMIR:

Q Mr. Reed, will you please state your full name? A Ernest Eugene Reed.

Q Where do you live? A 5270 Chillum Place, Northeast.

Q And you are the father of the late Dwight

10 K. Reed? A I am.

Q I will ask you, how long have you been a resident of the District of Columbia? A Ever since '41.

* * * *

11 Q When was your son, Dwight K. Reed, born? A The 27th of March, '53.

Q And that would make him around seven years old in 1960 at the time of the accident? A Yes, sir.

Q Now, did he go to school?

MR. ARNESS: Your Honor, the dates can be computed at 7½ years old.

THE COURT: I beg your pardon.

MR. ARNESS: I say, from March of 1953 to August of 1960 is 7½ years.

THE COURT: I know, but we cannot go by fractions, Mr. Arness.

BY MR. YASMIR:

Q Did he go to school? A Yes, sir.

Q What school did he attend? A He attended the Gidding School.

12 Q And what grade was he in at the time? A Second grade.

Q And what was the condition of his health from your observation as living with him as the father of the child? A Very good.

Q That was up to the time of his death? A Yes, sir.

MR. YASMIR: That is all. Your witness.

MR. ARNESS: I have no questions.

* * * *

JAMES W. BRAMHALL

was called as a witness for the plaintiff and, being first duly sworn, was examined and testified as follows:

* * * *

13 Q Now, in your capacity as an officer of the A.I.U., Accident Investigation Unit, did you have occasion to investigate a fatal accident on New Jersey Avenue involving one Dwight K. Reed? A Yes, sir.

* * * *

BY MR. YASMIR:

Q Could you place on that blackboard where the skid marks were? A Yes, sir.

Q Would you please do so?

THE COURT: Were there any skid marks?

THE WITNESS: Yes, sir.

BY MR. YASMIR:

Q Did you measure skid marks? A Yes, sir.

Q How long were they? A 93½ feet.

Q Was there a blood spot there? A Yes, sir.

THE COURT: What kind of a spot?

MR. YASMIR: Blood spot.

* * * *

ERNEST E. REED

recalled to the stand, having been previously duly sworn, was examined and testified further as follows:

DIRECT EXAMINATION

BY MR. YASMER:

Q Mr. Reed, at the time of this accident can you tell us how tall your son was? A He was four feet four inches in his stocking feet.

* * * *

BY MR. ARNESS:

Q Mr. Reed, you told us yesterday that your son was in the second grade. Was he about to go into the third grade? A Well, at that particular time he was—when he was in the school, the next term he would go into the third grade.

Q And was he a bright, alert child for his age? A He was.

* * * *

MR. YASMER: Officer Bramhall.

JAMES W. BRAMHALL

resumed the stand, having been previously duly sworn, was examined and testified further as follows:

* * * *

24 Q Did you make—can you tell us the length of the bridge there or, as you call it, I think, the viaduct, the entire viaduct? A The length of the center wall, the center of the street, is 178 feet.

* * * *

25 Q Did you ascertain the width of New Jersey Avenue at the point of the viaduct or bridge? A Yes, sir.

26 Q What was that, sir? A 40 feet.

* * * *

Q Now, Officer, did you find any blood spots in that locality, as well as skid marks? A Yes, sir.

Q Can you tell us about where they were? A There was one blood mark 45 feet north of the north end of the bridge.

* * * *

27 A Well, 45 feet north of the north end of the bridge there was skin and blood marks on the street, indicating the pedestrian was dragged from this point. These skin and blood marks went on 43 feet. At the end of the 43 feet there was a large pool of blood. That made a total of 88 feet north of the bridge.

Q That is 88 feet skid marks north— A No, no; 45 feet north of the north end of the bridge there were skin and blood marks on the street, indicating the pedestrian was drug from that point. These skin and blood marks were 43 feet long. Now, at the end of that 43 feet there was a total of 88 feet. There was a large pool of blood, indicating that is where the pedestrian came to rest.

THE COURT: That was 88 feet?

* * * *

28 BY MR. YASMER:

Q Did you get into Mr. Block's truck, that is, the Gulf Oil truck, and run a test skid? A Yes, sir.

Q At the same location? A Yes, sir.

Q Now tell us just what you did when you performed this test skid or this skid test. A We turned the truck around, went back across the bridge and then headed in the same direction that he was going and went at 25 miles an hour and applied the brakes.

Q At 25 miles—

THE COURT: Well, what did you find as a result of that test?

THE WITNESS: We measured the skid marks. The result was 46 feet 8 inches at 25 miles an hour.

THE COURT: Does that mean that it would take 46 feet to bring the truck to a stop at a speed of 25 miles an hour?

THE WITNESS: That is what it took us, yes, sir.

Q Now, your assignment with the Metropolitan
29 Police Department as an A.I.U. man, what work do you do? A Investigate accidents.

THE COURT: I think we all know that. That is a matter of common knowledge. They investigate accidents.

MR. YASMER: Very well, if Your Honor thinks he is qualified.

THE COURT: Oh yes.

BY MR. YASMER:

Q Now I will ask you this: What sort of a pavement was it, macadam or asphalt? A Macadam.

Q What were the weather conditions? A Clear and dry.

Q Was it a level stretch there, the part traversed by the truck, or was it an incline anywheres? A It was a downgrade.

Q Did you first go up—

THE COURT: You mean a downgrade after you left the bridge or the bridge itself was downgrade?

THE WITNESS: Just about the north—just south of the north end of the bridge starts a downgrade, slight downgrade. I think it's two per cent.

Q Now, Officer, considering all the factors, the length of the skids, the weather condition and the surface, could you estimate the rate of speed the truck was traveling at the time it struck the boy? A I used a speed braking distance calculator that we use.

Q Is that an official, an approved device? A Yes, sir, we use it in A.I.U.

THE COURT: You may proceed, Officer.

Q What rate of speed do you estimate the truck was going at the time? A Just about 35.

Q 35 miles an hour? A Yes, sir.

THE COURT: Was this in a 25 mile zone, gentlemen?

MR. YASMER: May I ask the officer?

THE COURT: You may ask the witness.

Q Officer, can you tell us what the legal rate of speed was for that locality? A 25.

* * * *

Q Where did you ascertain the point of impact to the truck to be? A Just above the left headlight.

* * * *

Q No. 9, sir, what does that represent? A That was taken from the middle of the south-bound lane looking—we had stopped the truck on the bridge in the north-bound lane, and in the center of the picture you just can see the top of the truck. That was supposed to represent what the child could see when he was in the south-bound lane.

* * * *

Q Now I show you plaintiff's Exhibit No. 12. What does that represent? A That is the skid mark, the original skid mark and the test skid mark.

* * * *

39 Q No. 16, the same question, sir? A That is a full front close-up view of the truck. It shows a small dent to the right side of the left headlight and a little blood on the street.

* * * *

Q No. 6, Plaintiff's Exhibit, the same question, Officer? A This was taken from about the middle of the south-bound lane, just to show—we parked the truck in the north-bound lane and this was to show—give an idea how much of the truck the pedestrian could see.

* * * *

Q Officer Bramhall, at the time of the accident, or when you came around did you find any children on that bridge or close to the bridge? A Yes, sir.

Q How many children did you find? A When we got there there was, I don't know, fifty, a hundred.

Q Oh. Did you ascertain how many children were with the deceased little boy, playing with him at the time of the accident? A I got the names of two who

40 said they were.

Q I see. What are their names? A Nathan Woods and Larry Brox.

Q Did you ascertain whether there were any more children around that bridge right before the accident and who were playing with the deceased? A There apparently were, but I didn't get their names.

Q Is there a playground, or let me put the question this way—

* * * *

Q Is there a public playground near the viaduct, where there is a path from the viaduct to such playground? A Off toward the right, at the north end of the bridge there is a playground.

* * * *

42 THE COURT: Mr. Yasmer, I directed you to exhaust all your evidence on liability first before going on to damages. I withdraw that direction. You just prove your whole case in any order you wish.

I had some misgivings as to whether there was enough of a case for the jury, but you have offered evidence—perhaps you will contradict it, of course, but that does not affect submitting the case to the jury—you
43 have offered evidence of a substantial nature that the defendant was going 35 miles an hour. That is evidence of negligence.

Now, I want to say this to you, Mr. Arness. Unless it can be shown to the contrary, I doubt very much whether a court can rule that a child seven years old is guilty of contributory negligence as a matter of law.

MR. ARNESS: Your Honor, the evidence in this case, the objective evidence in this case is that that boy was down behind that wall and set out intentionally to beat this truck.

THE COURT: I am assuming that you will prove that.

* * * *

45 THE COURT: It does seem to me, Mr. Arness, that this case has a settlement value. That is another reason why I kept the jury in the jury room. Here you have an oil truck. We know what oil trucks are, they are gigantic.

MR. ARNESS: This is just a little pick-up truck, Your Honor. It is a service truck.

THE COURT: This is not an oil truck?

MR. ARNESS: No, it's a little pick-up truck.

THE COURT: Well, even so, 35 miles an hour on a city street—this is not exactly on the outskirts of the city, you know.

MR. ARNESS: But it is on a long stretch of road without any intersections; and I think, Your Honor, al-

though I know the speed limit is that, I think it
46 would not be negligence as a matter of law.

THE COURT: It would not be negligence as a matter of law.

MR. ARNESS: And I think most people drive—unfortunately so, perhaps—but I think an average driving speed is not below 25 miles an hour.

THE COURT: I think the average driver exceeds the speed limit, but he does not exceed the speed limit by 10 miles. There is a difference between going 28 miles in a 25 mile zone and 35, and especially a truck. There is a feeling about trucks, that some of them drive too fast.

MR. ARNESS: But, Your Honor, my problem with this case is that I do not see how speed could be a proximate cause of this accident.

THE COURT: Yes, it can, for this reason: I have said this so very often. I have heard a lot of people say there is nothing dangerous about speed if a person does not violate any other rules, there is nothing dangerous per se about speed. Speed does not cause accidents, no, but when there is an accident at an excessive speed the results are terrifically more than if you were going, say, 20 miles an hour.

MR. ARNESS: Yes, but in this particular case and under the circumstances that are presented here, no one could say that this accident wouldn't have happened at
20 miles an hour. This boy—

47 THE COURT: I am going to let the jury decide that. I am going to let the jury decide whether the excessive rate of speed was a proximate cause of the accident. I don't think I should decide it.

* * * *

48 MR. ARNESS: Your Honor, I have a very strong feeling. I know that feelings do not decide law suits, but I don't see why a defendant should be held liable in damages for failing to avoid a boy who intentionally set out to do something of this kind.

THE COURT: Morally you may be right, but after all, this is not what decides law suits.

MR. ARNESS: But—

THE COURT: But on the other hand, a little six or seven or eight year old child, you cannot put an adult's head on their shoulders.

MR. ARNESS: You can hardly dodge them, though. It's awfully difficult to escape them.

THE COURT: Mr. Arness, I am not discussing the moral merits of the case. This is a law suit. Trucks have no business to be driving along at 35 miles an hour in city streets. Now, it may be he was not going
49 35 miles an hour, maybe he will convince the jury that he wasn't, but I have got to leave this question to the jury. And I also am not going to say that driving 35 miles an hour is negligence as a matter of law. I don't think I should. But I will say, You have a right to find it is negligence, it is for you to decide.

MR. ARNESS: I would be very interested, and I always am, in Your Honor's views, and I would like to have the opportunity to report Your Honor's views to my client.

THE COURT: So, I think that this has a good settlement value, in proportion, however, to the possible measure of damages. The real thing here, to my way of thinking, is measure of damages. You don't get very big verdicts for the death of a seven year old child because I will have to instruct the jury that the jury will have to consider how much it would have cost to bring up the child before the child could start contributing to the support of the family and all that sort of thing.

MR. YASMER: I am fully aware of that.

MR. ARNESS: In my research, I notice that Your Honor has written all of the law in the District of Columbia on this subject, in a number of cases. I have not found any authoritative decision written by anyone else.

THE COURT: Is that so? You mean the Hord case?

MR. ARNESS: No; Your Honor has written many other opinions as well.

THE COURT: Before I make any suggestion as to a figure, I am sincerely perplexed as to what would be a good settlement figure in a case such as this, not because of the questions of liability but because of the question of measure of damages.

What is your view on that?

* * * *

THE COURT: Just a moment. On the other hand, nothing can compensate a parent for the loss of a child. What does he want, does he want money for this child? You see, there is another moral aspect there. Of course, the least he should get is any expenses that he was put to, like funeral bills, but beyond that there aren't any other expenses. I think he should get something beyond that. What figure would you consider recommending?

* * * *

THE COURT: Remember, I am not going to pursue this discussion because I would consider I am wasting everybody's time if the discussion is to be concerning a large figure.

MR. YASMER: No, I understand. And I have settled these and I have tried them and got verdicts; I know what it is.

THE COURT: Very well.

(There was a pause in the proceedings.)

MR. YASMER: I really talked to him. $3,500. He won't consider anything less. $3,500 for settlement. I think that is fair.

THE COURT: Did you say $4,500 or $3,500?

MR. YASMER: $3,500.

MR. ARNESS: Your Honor, that puts me at a little difficult position. As I understand it, Mr. Yasmer called

my client yesterday afternoon, of course with my permission, and demanded $3,000, and I am in a little bit of difficulty in view of that.

THE COURT: Did you say $3,000?

* * * *

52 THE COURT: What about 3,000?

MR. YASMER: Let him try and get $3,000.

THE COURT: Very well.

* * * *

54 Q Officer Bramhall, by virtue of your experience and training as an Accident Investigation Unit officer, can you tell us the distance a vehicle travels at 25 miles an hour? A It's approximately—well, the way you figure it is approximately one and a half times its speed.

THE COURT: I am afraid there was a slip of the tongue in your question.

Would you read the question?

(The last question was read by the Reporter.)

MR. YASMER: Per second.

THE COURT: Yes.

MR. YASMER: I'm sorry. Thank you, Your Honor.

THE WITNESS: It's approximately 36.7 feet.

Q At 35 miles an hour what distance will a vehicle travel per second? A Approximately 51.3.

* * * *

55 Q Officer Bramhall, following up that same thought that you expressed earlier, to find out the feet per second that an automobile travels you multiply its speed times about one and a half, is that it? A Yes, sir.

Q Now, officer, were you the first Accident Investigation Unit officer on the scene of this accident? A Yes, sir.

Q You were the first investigating police officer, then? A Yes, sir.

Q Now, when you got to the scene of the accident and in order to take the pictures that you have shown us here, you made certain observations and certain inquiries, didn't you? A Yes, sir.

Q Now, you got to the scene of the accident at a time, did you, when some people were still gathered around and there was still the excitement of the accident hanging in the air? A Yes, sir.

56 Q And you told us that you identified three witnesses, three persons as having been witnesses to the accident? A Yes, sir.

Q Those were, I believe you told us, Nathan Wood? A Right.

Q And a Larry Brox? A That's right.

Q And was it Charles Kinkaid? A Yes, sir.

Q Now, it's part of your duties as an investigating police officer to ascertain the names and addresses of those persons who were close enough to have seen something relevant to the accident and to note them in your report, isn't it? A Yes, sir.

* * * *

Q Now, what did—when you got to the scene of the accident and the excitement of the accident was still hanging there, what information did you obtain from these witnesses with reference to what had happened? What did Larry Brox and Nathan Wood tell you?

MR. YASMER: I object.

THE COURT: Objection sustained.

57 MR. ARNESS: May we approach the bench, Your Honor?

THE COURT: No; that is clearly hearsay.

MR. ARNESS: Your Honor, may I submit I tried to qualify it as a res gestae statement because it was in the—

THE COURT: No; you mean as a spontaneous exclamation?

MR. ARNESS: Yes, Your Honor.

THE COURT: Not the way you are bringing it out. The officer says he questioned certain witnesses and they gave him certain information. That is not a spontaneous exclamation. It is not within the exception to the hearsay rule.

BY MR. ARNESS:

Q How long after the accident happened—

MR. ARNESS: May I pursue the matter by question?

THE COURT: Yes, of course.

Q How long after the accident happened was it when you arrived on the scene and talked to these boys? A Well, we arrived about 13 minutes later.

Q And had anyone else, to your knowledge, talked to the boys about what had happened before that time? A Not that I know of, no, sir.

Q Was there still at that time milling around an excitement surrounding the accident at the scene? A Yes, sir.

58 Q To your knowledge had these boys talked to anyone or had any opportunity for reflection before you talked to them? A Not as far as I know.

Q Did you conduct a formal investigation or did they just come up, they said they saw what happened to their friend and told you what happened? A No, nobody volunteered anything. We went looking.

THE COURT: You went around and—

THE WITNESS: We went and asked.

Q Where did you find Larry Brox and Nathan Wood?

THE COURT: I am going to adhere to my ruling. This is not within the exception to the hearsay rule. For example, if the officer came on the scene and somebody ran up to him and exclaimed such and such a thing happened, I would allow that as being part of the res gestae, but when an officer goes around and finds somebody and questions him, then that person's answers are not spontaneous.

After all, you have a right, either side has a right to subpoena those boys and put them on the stand. Then they would be subject to cross-examination.

MR. ARNESS: Being friends of the plaintiff, I assume that will be done.

MR. YASMER: I object to that statement. There is no proof here that these are friends.

59 THE COURT: There is no harm in that statement.

MR. YASMER: Frankly, we don't intend to have them here.

* * * *

60 Q Plaintiff's evidence Exhibit Nos. 6 and 8. First No. 6. Now, will you tell us what that picture, again, what that picture was? A This is looking south. It shows just the top of the truck over the top of the wall.

Q And did you indicate that you had the truck parked in that position? A That's right.

Q And you stood over in the south-bound lane with the camera and took it from the position you have indicated? A That's right.

Q And when you took that picture did you crouch down? A Yes, sir.

Q And, officer, why did you crouch down and take that picture from that particular vantage point with the truck in that position? A To try to show what the pedestrian could see, related to the truck coming up.

Q What led you to believe that the pedestrian
61 had been in that position behind the wall with the truck on the other side? A From what I had been told.

Q When you arrived on the scene? A That's right.

Q Now, this photograph, Exhibit No. 8 for identification, will you tell us what that was? A That was taken from the driver's seat of the truck looking north.

Q And looking over what, sir? A It's what the driver would see.

Q It's not looking directly north on New Jersey Avenue, is it? A No, it's looking toward the abutment on the end of the center wall.

Q Well, in the exact center of the picture is that wall that we have been talking about, isn't it? A That's right.

Q And the picture, above the center of the photograph, shows over that wall, doesn't it? A That's right.

Q And why did you take the picture from the truck pointing in that direction? A To show what the driver could see.

62 Q And were you told that the pedestrian had come in front of the driver from that direction? A That's right.

Q Now, Officer Bramhall, you showed us on these photographs this morning a dent that appeared over the left front headlight. Was that the only mark on the front of the vehicle indicating that there had been an impact? A Yes, sir.

Q And that would have been, would it, the headlight closest to the wall that appears on the other two photographs I have just discussed with you? A That's right.

Q Now, when you arrived at the scene of the accident were you able to arrive at a conclusion with respect to approximately where the impact was between the boy and the vehicle? A Yes, sir.

Q And what conclusion did you arrive at, sir, as to approximately where the two came together? A Right at the end of the center wall on the north end of the bridge.

THE COURT: At the north end of the bridge?

THE WITNESS: Yes, sir.

* * * *

64 Q And then you used a chart that you have in the Accident Investigation Unit to make a computation, did you? A Yes, sir.

Q Now, that chart is not one that is particularly related to trucks, it covers all vehicles, doesn't it? A Yes, sir.

Q And it is based on average statistics, not related to this particular case, is it? A That's right.

Q So there are some variables, depending on the circumstances, within certain limits, are there not? A Yes, sir, that's right.

* * * *

65 Q Now, do you have in your file a scale drawing of this area? A Yes, sir.

* * * *

66 Q What does that show the height of the wall is, Officer Bramhall? A It says five feet.

* * * *

Q Thank you. Officer, as a practical matter, was that lane on the viaduct for northbound traffic a lane that was used for one vehicle at a time going north? A Yes, sir.

THE COURT: It is a one-lane roadway?

THE WITNESS: That's all, yes, sir, for all practical purposes.

BY MR. ARNESS:

Q Now, you have indicated on the diagram, Officer Bramhall, approximately where the playground is.

67 Actually, that playground is not on the level of this street at all, is it? A No, sir.

Q It's down at the level of the railroad tracks, below the viaduct, isn't that so? A I don't know whether it's on the exact level of the railroad tracks, but it's below the street level.

Q You have to go down a flight of stairs or else run down an embankment to get to the playground, do you not? A Yes, sir.

* * * *

Q Now, the sidewalk area that is located in this vicinity, when it comes to the end of the wall on the
68 north end of this viaduct, juts over to the right, before it continues on, does it not? Is there a bend in the sidewalk after you come off the north end of the viaduct so that it juts in this direction and then continues on? A That's right.

Q Now, the walls that we had there, the one on the right side jutted out and went a little further north than the wall in the center, did it not? A Yes, sir.

Q And the one on the left or west side went substantially further north than either of the other two, didn't it? A Yes, sir.

* * * *

70 THE COURT: What has been admitted is a funeral bill for the child, as I understand it, from John T. Rhines and Company, Morticians, amounting to $723.40, is that right?

MR. YASMER: That is correct.

* * * *

71 MR. YASMER: "Autopsy card No. 28225. D. C. Morgue, August 24, 1960, 1:00 p.m.

"Name, Dwight K. Reed; color; age, 7 years; weight, 60 pounds; height, four feet four inches; sex, male.

"Previous history, struck by truck. Clothes—" which has nothing to do with it—

"There were extensive abrasions of both sides of the forehead, both malar regions and the chin, about the right elbow, forearm and wrist, just above the crest of the left ilium, about both knees and back of right leg. There was a fracture of both bones of the right leg in the mid-third. There was a very extensive fracture of the skull, extending from the right temporal bone through the oc-
72 cipital bone into the left temporal bone and into the right parietal bone, with marked separation of the fragments and extensive brain damage. The internal organs were negative for pathology.

"Present at autopsy, Mr. Salik M. Kaplan.
"Cause of death, crushed H and S, crushed skull.
"Performed by Dr. Rosenberg."

* * * *

74 MR. FIRST: Section 22(c), Your Honor.

THE COURT: I am going to ask you gentlemen to come to the bench.

(AT THE BENCH:)

THE COURT: How is 22(c) relevant?

MR. FIRST: We feel that is a special hazard.

THE COURT: What is the special hazard?

MR. FIRST: The bridge.

THE COURT: The bridge is not a hazard. Do you see any—

MR. ARNESS: No, Your Honor, there is no evidentiary basis for that.

THE COURT: I don't think there is any evidential basis for 22(c).

MR. YASMER: The very fact that it has this dividing wall—

THE COURT: There is no use getting inadmissible evidence into the record.

75 MR. YASMER: All right.

MR. FIRST: Section 54, Your Honor.

THE COURT: 54 is proper.

MR. ARNESS: May I be heard ,Your Honor?

THE COURT: Yes.

MR. ARNESS: There is no evidence in this case that the child was ever in a position where he could be seen. There must be an evidentiary basis.

THE COURT: Well, I am going to admit it. It may have some bearing.

MR. FIRST: And 99(c), Your Honor, full time and attention.

* * * *

THE COURT: I am going to sustain the objection. It is a perfectly good regulation, but there is no evidence it has been violated.

* * * *

77 Section 54:

"Drivers to exercise due care.

"Notwithstanding the foregoing provisions of this article, every driver of a vehicle shall exercise due care to avoid colliding with any pedestrian upon any roadway and shall give warning by sounding the horn, when necessary, and shall exercise proper precaution upon observing any child or any confused or incapacitated person upon a roadway."

* * * *

78 MR. ARNESS: Your Honor, at this time I move for a directed verdict on behalf of the defendant. There isn't even any evidence in this case that the truck struck the plaintiff, the decedent. This officer arrived at the scene. He has been the only witness to testify. There was no body even on the scene when he arrived.

THE COURT: What about that?

MR. YASMER: What is that, now, please?

THE COURT: What about that? Mr. Arness says you have not introduced any evidence showing that the child was struck by the truck. You see, when the officer's testimony started I thought that the body was still there and was observed.

I will let you reopen your case on Tuesday to supply that.

* * * *

79 MR. ARNESS: Your Honor, my motion goes much more substantively than a technicality. This certainly is not a res ipsa loquitur case on liability.

THE COURT: No, but so far as negligence is concerned, I am going to hold that there is enough to go to

the jury because the officer testified that the truck was going 35 miles an hour.

MR. ARNESS: Even without any evidence as to what the circumstances of the accident were?

THE COURT: Of course. It is negligence to go that fast, to go ten miles above the speed limit.

MR. ARNESS: You mean it might be under certain circumstances; you don't mean that it is.

THE COURT: Not negligence as a matter of law, but it is enough to create a question for the jury. I
80 certainly would be in error if I held as a matter of fact it is not negligence.

* * * *

In order to avoid the necessity of reopening the plaintiff's case I will stipulate that this truck hit this boy.

THE COURT: Very well.

* * * *

THE COURT: No, I am going to let this case go to the jury, Mr. Arness. You can argue it again, if there is a plaintiff's verdict. I will hear you then, but I am going to take the jury's verdict here because I
81 think there is a question for the jury whether or not it is negligence to drive at any time, anywhere, ten miles above the speed limit. If it was 26, 27, 28 miles an hour, that would be a different proposition. I am not going to rule that it is negligence as a matter of law, that would be error also, but I think I should leave it to the jury.

* * * *

86 LARRY BROX

called as a witness by the Defendants and, having been duly sworn, was examined and testified as follows:

* * * *

87 Q Larry, back on August 23, 1960, did you witness an accident where Karl Reed was hit by a truck? A Yes, I did.

Q Had you been with him that day? A Yes, sir.

Q When the accident happened, just at the time the accident happened, what was Karl doing? A He was running across the street.

Q Did he say anything just before he ran across the street, that you heard? A He said, "Watch me beat this car."

Q Now, was this place where the accident happened, Larry, near a bridge that goes over a road near a playground? A Yes, sir.

Q Now, earlier that morning, before the accident happened, had you boys been playing in the playground? A Yes, sir.

Q Where had Karl been last before he ran across the street? A He was down on the other side of the park.

88 Q Larry, is that on the other side of the street, away from the playground? A Yes, sir.

* * * *

Q Now, when you were there, just before the accident happened, did you hide? A Yes, sir.

Q And where did you hide just before the accident happened, Larry? A It was over here (indicating).

89 Q Behind that wall? A Yes, sir.

* * * *

Q Now, Larry, let me show you what's been marked as Plaintiff's Exhibit No. 5 and ask you if you can tell me, do you recognize this picture? A Yes.

Q Now, do you see a wall in that picture, too, over here on this side (indicating)? A Yes, sir.

Q Now, before Karl started to run, where was Karl? A He was over on this side (indicating).

Q Behind that wall? A Yes, sir.

Q Now, when Karl ran out did he run out in the street from this side of the picture over towards this side, from left to right on that picture? A Yes, sir.

Q And did he run out at a point close to the end of this wall? A I don't remember that.

* * * *

92 Q Which wall were you behind when you hid? A The one in the middle.

* * * *

BY MR. ARNESS:

Q Now, just before the accident happened, what is the nearest you recall what you heard Karlston say? A "Watch me beat this car."

* * * *

95 BY MR. YASMER:

Q You say that Nathan was there on the bridge, playing with you, right before the accident? A Yes, sir.

Q Right. Who else was there? A Nobody.

Q Now let me refresh your recollection. Have you a brother? A Yes, sir.

Q What's his name? A I have three brothers.

Q Well, was one of your brothers with you? A Yes, sir.

Q That's right. Which one was with you? A My youngest brother.

96 Q What's his name? A Otto.

Q Otto? A Yes, sir.

Q So, Nathan was there on the bridge, and you were there, and your brother Otto, and the boy who was killed, Karl, is that right? A My brother wasn't there.

Q Your brother— A My brother was playing with me, but he wasn't on top of the bridge.

Q I see. Was he on the bridge at any time, do you recall? Think, Larry.

MR. ARNESS: Your Honor, I object to that. It's not relevant whether he was on the bridge at any time.

THE COURT: Any time is too broad. I will sustain the objection.

MR. YASMER: Yes.

BY MR. YASMER:

Q Right before the accident? A What did you say?

THE COURT: Suppose you repeat the question in full.

BY MR. YASMER:

Q Was your brother Otto with the other children you named on the bridge at any time within a minute
97 or so before the accident? A No, sir.

Q He was not? A No, sir.

Q I see. Now, you told us that Nathan Wood was on the bridge? A Yes, sir.

Q All right. Whereabouts on the bridge was he? First try to answer the question in your own way. A He was in front—he was on the top—not on the top, in front of the bridge, leaning against it.

Q Wasn't he near Karl, on Karl's end of the bridge, Larry? A Yes, sir.

Q And you were in the middle of the bridge? A Yes, sir.

Q Now, do you remember Robert Simpson? Wasn't he with you? A Yes, sir.

Q That's right. And wasn't Robert Simpson also on the other side of the bridge when the accident happened? Think hard. A I don't remember.

Q You don't remember. Do you remember
98 playing with Robert Simpson at all right before the accident? He is the tall boy. A Yes, sir. I was playing with him, yes, sir.

Q You were playing with Robert Simpson? A Yes, sir.

Q Now, at first all you boys, Nathan Wood, you, your brother Otto, Robert Simpson, weren't you all in the playground down below the bridge? Isn't that right? A Yes, sir.

Q Now, you were playing a certain—do you remember what game you were playing down below the bridge in the playground? A No, sir.

Q You don't. Is there a path leading where the boys came up from the playground to the bridge? A Yes, sir.

Q Now, the playground has swings, hasn't it? A Yes, sir.

Q It's a regular playground for children to play? A Yes, sir.

Q And from there you took that path and you sort of climbed up to the bridge, you walked up to the bridge on that path? A No, sir.

99 Q How did you get on top of the bridge? A I went around.

Q What do you mean by that? A It's a bridge and under the bridge. I went under the bridge.

THE COURT: Try to speak a little louder, if you can, young man.

BY MR. YASMER:

Q Larry, I know you were under the bridge. Now, how did you get on top of the bridge where the road was, where the accident happened? A It's a pathway coming on the other side. When you go under the bridge you can come up.

Q And that is how you came up? A Yes, sir.

Q And the other boys came up with you, the boys we mentioned like Nathan Wood and your brother and Karl? A No, sir—I can't remember.

Q You can't remember how they came up? A No, sir.

Q But they were there right before the accident, around the bridge? A I can't remember where they were.

100 Q What's that? A I can't remember where they were.

Q Well, you just told us—

THE COURT: Don't argue with the witness.
MR. YASMER: Well, he is a child.

BY MR. YASMER:

Q Were you playing—do you remember what game you were playing? A No, sir. We were just jumping out there, swinging.

Q I mean, when you got to the bridge were you playing cops and robbers? A I can't remember. Some of us were chasing the others.

Q On the bridge you were chasing around? A Yes, sir.

* * * *

101 Q Larry, was there anyone else in the street just before the truck came along, except Karlston, in the roadway? A Yes.

THE COURT: When you say the street, do you mean on the bridge?

MR. ARNESS: No, I mean in the roadway that the truck was using.

THE COURT: The roadway on the bridge or on the street beyond the bridge or preceding the bridge?

102 We have been using the word bridge. Now you are using the term street. Are you using the two synonymously or not?

MR. ARNESS: Your Honor, I mean the roadway on the bridge, but I don't mean behind the cement walls.

THE COURT: Then let's use the word bridge because when you change nomenclature one wonders whether you are using a different concept.

BY MR. ARNESS:

Q Now, Larry, on the bridge, in the roadway that the truck was using and inside the cement walls, were there any other boys just before the accident happened, except Karlston? A I was over there where "178" was (indicating) but not that far down.

Q Now, when the truck came by, there was a wall between you and the truck, wasn't there? You were hiding behind the wall, weren't you? A Yes.

* * * *

BY MR. YASMER:

Q Wasn't Nathan Woods there, too? A Yes, sir, he was in front of, it's a little—

103 Q I don't hear you. A In the front of it is a little round thing made of cement that he was standing on.

Q He wasn't standing far from Karl, was he? A No, sir.

Q Also on the bridge? A Yes, sir.

Q You were standing where that cement divider was, where that wall dividing the bridge—

THE COURT: I think we have had that two or three times, he was behind the wall.

* * * *

BY MR. YASMER:

Q Could you see Karl and Nathan Wood from where you were standing? A I couldn't see Nathan, but I could see Karl when he was at between the bridge

104 and the truck.

* * * *

MR. ARNESS: Thank you very much.

Your Honor, I asked Mr. Yasmer, in order to save recalling Officer Bramhall, if he would stipulate with me that the skid marks testified to were over-all skid marks not actual skid marks, that they included the length of the truck. He said he would.

THE COURT: In other words, you deduct the length of the truck?

MR. ARNESS: Yes, Your Honor.

THE COURT: I assume that is what they were. When we speak of skid marks we mean over-all, unless we say something to the contrary. However, I think it is just as well to clarify the record.

MR. ARNESS: Yes. I had neglected to do that.

* * * *

105 CHARLES KINKAID

called as a witness by the Defendants and, having been duly sworn, was examined and testified as follows:

* * * *

BY MR. ARNESS:

Q Mr. Kinkaid, will you use the microphone and keep your voice up so that everyone can hear you, and state your full name, please, sir? A Charles Kinkaid.

Q Where do you live, Mr. Kinkaid? A 76 Forest Terrace, Southwest, apartment 104.

Q What is your employment? A I work for the Post Office as a special delivery messenger.

Q On August 23, 1960, what was your employment? A I was working for the Post Office.

Q On that day, in the vicinity of the 600 block of New Jersey Avenue, Southwest, did you witness an accident between a pickup truck and a little boy? A Yes, I did.

Q Now, prior to that accident, in which direction and on what road had you been traveling, sir? A New Jersey Avenue, traveling south.

106 Q And in which direction was the truck, that was involved in the accident, traveling? A On New Jersey Avenue, traveling north.

THE COURT: I wonder if it wouldn't be a good idea to bring out whether he was on foot or traveling in a vehicle and so on.

MR. ARNESS: Thank you, Your Honor.

BY MR. ARNESS:

Q Where were you at the time of the accident, were you in a vehicle? A Yes, I was driving a vehicle for the Post Office.

Q Was that a mail truck? A Yes, it was.

Q Now, as you drove south on New Jersey Avenue, did there come a time when you approached a bridge, over another roadway or a viaduct, which had concrete walls on either side and in the middle, separating the north and south bound lanes? A Yes.

Q May I show you —

THE COURT: Just a moment. I want to be sure we have the directions correctly. The witness was traveling south and did he say the truck was traveling north?

MR. ARNESS: Yes, Your Honor.

THE COURT: You know, this is the first time,
107 as I recall, that the direction of the truck has been mentioned.

MR. ARNESS: Well, sooner or later all facts have a way of coming up to the surface.

THE COURT: But the plaintiff did not bring it out.

* * * *

Q Now, will you tell us, Mr. Kinkaid, what you observed as you approached this bridge area that we have now described? A Well, I picked up the move-
108 ment of the boy going from the west side of New Jersey Avenue toward the center of the street as he was approximately in the center of my lane.

* * * *

Q Now, what was the boy doing, sir? A He was running.

109 Q And was he running slowly or fast or medium? What's your recollection? A I would say medium, a medium gait.

Q Now, what, if anything, did you observe at about that time? A Well, after I picked up his movement

and just before he reached the center of the street, I then noticed the truck coming toward me.

Q When you noticed the truck, did you notice anything unusual about its movement? A Not as I recall.

Q What did you observe after that, sir? A Well, the boy reached the center of the street and then stepped out, as I recall, and the truck hit him instantaneously as he left the center of the street.

Q You say he left the center of the street. Was he still running then? A Yes, as I recall, yes.

Q When you approached the scene of this accident, did you see any other boys, except the one you have now described, in and about the traveled portion of the roadway? A No.

Q What did you do after you observed this accident, sir? Just as soon as you observed the truck come
110 in contact with the boy, what did you do? A I stopped the carrier, went back to the accident.

Q Did you give your name to the police officer as a witness to the accident? A Yes, I did.

* * * *

HARRY R. BLOCK

a defendant herein, was called to the witness stand and, having been duly sworn, was examined and testified as follows:

* * * *

111 Q What is your employment? A Gulf Oil mechanic.

Q And how long a time have you been employed as a mechanic for the Gulf Oil Company? A Right now, fifteen and a half years.

* * * *

Q How old are you, Mr. Block? A Fifty-three.

Q Now, on August 23, 1960, were you the driver of a pickup truck that was involved in a collision with a little boy? A Yes, sir.

Q Now, will you tell us a little more about that
112 truck that you were driving? What type of a truck was it, sir? A It's a 1957 Chevrolet, half-ton pickup.

* * * *

Q Now will you tell us, sir, as you—did the accident happen right on the bridge or just as you were coming off the bridge? A Just as I come off the bridge, sir.

Q While you were on the bridge, can you tell us about what speed you were traveling, sir? A I was traveling about 25, 30 miles an hour, sir; normal speed.

Q Now, was there any other traffic that you noticed that was going in the same direction you were go-
113 ing on that day? A I didn't notice any.

* * * *

Q Now, as you were on the bridge and approaching the end of it, were there any children or any pedestrians of any kind that you saw in the roadway ahead of you? A No, sir.

Q Now, as you approached the end of the bridge, will you tell us what did happen? A Just as I approached the end of the bridge I saw a boy run out from the wall there, right in front of my truck, sir.

Q And what did you do when you saw that, sir? A I hit the brake, sir, as soon as I could and tried to stop fast as I could, sir. I was all nervous.

Q How far away, how far in front of you, approximately, was the little boy when he ran out in front of you? A I'd say two to three feet, sir.

Q And from what did he run? A It was a wall about five foot high with a sign on it. He run right smack out from there, right in front of the truck.

114 Q Now, was the accident a complete surprise to you, sir. A Yes, sir, it was, sir.

* * * *

115 Q And were you acquainted with that locality where this accident happened? A I been over that bridge a few times, yes, sir.

Q How many times? A A few times, yes, sir.

Q Isn't it a fact that you were quite familiar with that locality, with that bridge? A Well, I know the bridge, yes, sir.

Q And you had been over it quite a few times? A Yes, sir.

Q And you know where the playground was, that there was a playground in the vicinity right near the bridge—

* * * *

116 BY MR. YASMER:

Q At the time of this accident and prior thereto, did you know that there was this playground right near the bridge, within the vicinity of the bridge? Did you know that? A I knew the playground was there, but I haven't been over that bridge for quite awhile, sir.

* * * *

117 Q You testified under examination by Mr. Arness that at the time you were going 25 to 30 miles an hour, is that right? A Yes, sir.

Q Could you have been going a little more than 30 miles an hour before your impact with the child,
118 with Dwight Reed? A I was going a normal speed.

Q You were going a normal speed? A Yes, sir.

Q You mean 30 miles—what is the legal speed rate, do you know, for that locality? A They didn't have no signs up then, sir. No speed signs was up there then.

THE COURT: Don't you know that the legal speed in the District of Columbia is 25 miles an hour unless some other speed is posted?

THE WITNESS: Yes, sir.

THE COURT: Very well.

* * * *

120 Q Can you see this blackboard from where you are, Mr. Block? A Yes, sir.

Q Now, this represents the bridge, this represents the divider we were talking about.

Did you see a little boy standing here, somewheres about the middle of the divider? A No, sir, nobody.

121 Q Did you see a little boy standing around over here when you were approaching the bridge? A No, sir.

Q Didn't see a little boy standing on this corner? A No, sir.

* * * *

124 JAY WRIGHT

called as a witness by the Defendants and, having been duly sworn, was examined and testified as follows:

* * * *

125 Q Did you, at my request, go to the 600 block of New Jersey Avenue on Friday and make certain measurements and certain photographs? A Yes.

126 Q Do you have those with you, sir? A Yes, I do.

* * * *

131 THE COURT: What do you want to show, that the wall was higher than what the policeman said?

MR. ARNESS: Yes, it's even higher than five feet, Your Honor.

THE COURT: Five feet is 60 inches.

MR. ARNESS: Yes, and this wall at the point is 63 inches high.

THE COURT: What's three inches between friends.

MR. ARNESS: Well, if it is stipulated that is is 63 inches, then I will go no further.

MR. YASMER: Stipulated.

THE COURT: He has already testified that he measured 63 inches.

132 MR. ARNESS: Yes.

* * * *

133 What does this photograph portray?

MR. ARNESS: It shows, Your Honor, that the playground is remote from the street where the accident happened, in that it is at a lower level and you have to go up those stairways.

THE COURT: That is not disputed. Both of you refer to the playground being on a lower level than the bridge. It that is all that this shows, it may be admitted.

* * * *

135 MR. ARNESS: Ladies and gentlemen of the jury, the two traffic regulations which have been admitted into evidence, 52(c) which provides:

"Between adjacent intersections controlled by traffic control signal devices or by police officers, pedestrians shall not cross the roadway at any place except in a crosswalk."

And 53(a) provides that:

"Every pedestrian crossing a roadway at any point other than within a marked crosswalk or within an unmarked crosswalk at an intersection shall yield the right-of-way to all vehicles upon the roadway."

Thank you, Your Honor.

* * * *

138 THE COURT: Then what is your motion?

MR. ARNESS: That a directed verdict with regard to the survivor count be directed.

THE COURT: I think it is the first count, is it not?

MR. ARNESS: Yes.

THE COURT: What do you say about that?

MR. YASMER: I consent to that.

THE COURT: The Court will direct a verdict for the defendants on the first count.

Is there anything else?

MR. ARNESS: Yes, Your Honor. I would like, as I did at the close of the plaintiff's case, to make
139 a motion for a directed verdict on the other count as well, at this time, on three grounds. On the ground, first, that I think no actionable negligence has been established; and may I tender to Your Honor a brief memorandum of law that I have prepared on that subject?

THE COURT: Yes, indeed.

(The document was handed to the Court.)

MR. ARNESS: Then, the second ground, that the contributory negligence of the minor here involved is clear as a matter of law in this case; and that there is, as I have stated in the memorandum, no showing of any circumstances from which a jury could conclude, other than the basis of conjecture or speculation, that anything the defendant did or the defendant's driver did was a proximate cause of this accident.

* * * *

140 MR. ARNESS: They stand for the sole proposition, Your Honor, that in a case where the circumstances show that a minor or other pedestrian darts out from behind an object into a path of a vehicle at a point in time when the accident can no longer be avoided, that the speed of the vehicle, whatever it might have been, is not and cannot be in law the proximate cause of the accident.

THE COURT: That is not a question of law, is it? That is a question for the jury.

MR. ARNESS: My position would be, Your Honor, that there must be some evidence which would enable rational people to say that there is a proximate cause in this case.

THE COURT: It seems to me excessive speed is always a proximate cause because, suppose this truck was going slowly and suppose the child darted across the path of the truck so that the accident could not have been avoided, but the child might not have been killed because the impact might not have come with as strong a force.

MR. ARNESS: Your Honor, there is no evidence on that and to indulge in that, I think, would be speculation.

THE COURT: No, you do not have to have evidence to show—that is a matter of common knowledge; in fact, it is an ordinary matter of physics that a vehicle going very fast will strike an object with much greater
141 force than a vehicle going very slowly.

MR. ARNESS: Yes, Your Honor, but in this case, with the child, the evidence establishes that the child was only two and a half or three feet away from the truck when he came out from behind the wall. It would seem to me that no one—

THE COURT: Well, one witness testified to that, and a very interested witness. I don't think that is conclusive.

MR. ARNESS: There is no evidence to the contrary, Your Honor.

THE COURT: I know, but the jury does not have to believe it.

* * * *

143 Now, I do want to ask this, Mr. Yasmer, before taking up the requests for instructions. I notice you are suing the driver also. Do you want him in the case as a defendant?

MR. YASMER: Not necessarily.

THE COURT: Do you want to dismiss against him?

MR. YASMER: I would dismiss against him, yes.

* * * *

144 MR. ARNESS: I thought Your Honor had previously indicated that, while speed in excess of the required limit could be evidence of negligence, you would not rule that it was negligence as a matter of law.

THE COURT: Yes. I will deny No. 2. You know, Mr. Yasmer, you can find cases decided by different panels in the Court of Appeals of this Circuit on this point as to whether a violation of a regulation is negligence per se or only evidence of negligence. Now, why create room for possible future controversy by asking me to give preference to one panel's decision as against another? As a matter of fact, I am not going to read 22(a). You may read it in your summing up. I am just going to say to the jury that the speed limit was 25 miles an hour, that driving in excess of the speed limit is evidence of negli-

145 gence which the jury may consider.

Now, gentlemen, I am not going to reread the regulations. You may do so in your arguments. I am going to deny No. 4. You know, these accident cases are not decided on traffic regulations, they are decided on the facts.

* * * *

THE COURT: Yes, you may read those regulations that have been admitted in evidence. That is true of both sides.

Now, No. 5, of course, is good law, but I don't see any basis for it here. I think No. 5 would apply if there was evidence that the driver saw children around. There is no evidence to that effect.

MR. YASMER: Of course, there is evidence that the child was 7 years, 6 months old, and that there were children—

THE COURT: But there is no—

MR. YASMER: —there were children on the bridge at the time.

THE COURT: Now, of course, if the child had been playing around on the bridge so he could have been seen,

say, 50 feet away, this No. 5 would be applicable, but the only evidence is that the child ran across in front of the vehicle.

I am going to deny No. 5. I do not think it is
146 applicable.

* * * *

THE COURT: Yes, I will give that as a part of the measure of damages. I don't single it out.

Now, No. 1 of the defendants and No. 6 of the plaintiff overlap. I am going to instruct the jury in my own way on the question of contributory negligence and
147 also on the point that a child is not held to the same degree of due care as an adult, but I am going to cover this in my own way rather than use the instructions of either side.

Well, No. 2 I will grant in my own way, again.

* * * *

THE COURT: I am granting No. 1 with the understanding I will cover the subject matter but in my own way.

No. 2 I am granting, but—gentlemen, I never adopt counsel's language because counsel's language is always partisan. The only usefulness of a requested instruction is to make sure that the topic is covered.

I am going to deny No. 3.

I am going to deny No. 4. I don't see any purpose in defining what is an unavoidable accident.

Mr. Arness, I do not see that No. 5 is pertinent to this case, at all.

MR. ARNESS: Yes, Your Honor, I think for the reason that Your Honor just advanced, that someone might hold the man to a greater standard of conduct after he saw the boy, such as swerving. Now, the law is
148 that he is not required to act in a perfect way.

THE COURT: I am going to deny No. 5 because the only negligence charged against the defendant is exceeding the speed limit.

MR. ARNESS: Then the jury would not be permitted, and counsel for the plaintiff would not be permitted to argue that the defendant should have swerved to avoid him?

THE COURT: You may argue that, yes, of course, but sofar as the law is concerned, there is no charge here that he did something when the emergency arose that was negligent. The only act of negligence charged in this case is exceeding the speed limit.

MR. ARNESS: Well, then, will Your Honor pardon my inability to grasp the situation. I don't see how plaintiff—if that is the situation, and I agree with Your Honor it is—how the plaintiff's counsel could then be permitted to argue something else, that is, that the defendant should have done something else that he failed to do.

THE COURT: I don't understand that—

MR. ARNESS: Such as swerve or take other evasive action.

THE COURT: I did not say that he could argue that.

MR. ARNESS: Then I did misunderstand Your Honor.

THE COURT: You have a right—of course,
149 gentlemen, in a summing-up speech there must be certain leeway for advocacy. The art of advocacy is not dead, as yet, although the type of oratory used in advocacy has changed. I have often said this to counsel, you have a right to argue anything, logical or illogical, provided you don't misstate the record and provided there is a basis in the record for what you are arguing and providing, of course, the argument is not inflammatory.

MR. ARNESS: Yes. As I understand it, the only issue to be argued in this case is whether or not the speed was negligence?

THE COURT: No, I don't say that. The only issue of negligence that the Court will submit to the jury is whether there was excess of the speed limit. You can talk

about anything that is in the record. I don't censor counsels' argument. You have a right to talk about anything, provided there is a basis in the record for it. I am just informing counsel what issue the Court will submit to the jury, which is entirely different.

MR. ARNESS: I take it, when the Court decides that is the issue to be submitted to the jury, the Court is ruling that that is the only thing there is a basis in the record for.

THE COURT: No, I am not ruling that, at all. You can talk about anything that is in the record. I am saying to you that the only charge of negligence that I shall submit to the jury, as I see it, is exceeding the speed of 25 miles an hour.

MR. YASMER: If the Court please, in addressing the jury I am going to refer to the evidence of the defendant's little witness, Brox, that there were four or more children on that bridge.

THE COURT: Both you and Mr. Arness have a right to refer to anything that is in the evidence.

MR. YASMER: Very well.

THE COURT: The mere fact that I am going to submit certain issues does not mean that you have not got a right to argue about anything that is in the evidence.

I am going to deny No. 6. Gentlemen, I do not know where this is derived from, but time and time again I am requested to instruct the jury that there is a legal presimption that reasonable care was exercised. There is no presumption either way.

MR. ARNESS: Your Honor—

THE COURT: So I am going to deny No. 6.

MR. ARNESS: May I offer orally a substitute instruction, if Your Honor will not give that language? Will Your Honor give the jury an instruction that there is no inference of negligence from the mere happening of an accident?

151 THE COURT: I always say that to the jury. The Court is not helped by the submission of requests on general points.

I am going to deny No. 7 as not applicable.

Now, of course, I am going to grant No. 8, but in my own way.

Now, gentlemen, you understand, of course, that you are not to prognosticate in your summing-up arguments what the Court is going to instruct the jury. I always prefer not to have counsel anticipate me because when they do they very often take a matter out of context and so on.

* * * *

156 THE COURT: In order to justify an instruction on any rule of law there has to be evidence to which it is applicable. Now, if there was evidence that there was an interval between the time that the boy started to run across the road and the impact, obviously, the doctrine of the last clear chance would come into play. You offered no evidence—and I appreciate the limitations you are suffering under; that is true in so many death cases—you offered no evidence to justify an inference that at the last minute the driver might have avoided the accident. The defendants' testimony is that the boy was only two or three feet in front of the truck at the time he started to run across the road. Now, obviously, the doctrine of the last clear chance does not apply there. After all, it is not the function of the Court to instruct the jury concerning abstract principles of law unless they can be applied to the evidence.

Now, the jury is not bound by the testimony of
157 the driver that the boy was only two or three feet away. They can ignore that testimony, but they cannot assume the opposite in the absence of evidence to the contrary.

Now, if we had the driver's testimony and if we had some other witness who testified that the boy was 30 feet

in front of the truck, I would instruct the jury on the last clear chance, but you have not got any such thing.

MR. YASMER: What we have is the testimony of the mailman. The driver of the Gulf truck was going north. This witness—what was his name—Kinkaid. Kinkaid was going south. He saw the boy when he started at the west end of the bridge or the road. The bridge is 40 feet wide. He saw him when he started from that end, going east. He said, under cross-examination by Mr. Arness, Mr. Arness asked him was the boy running fast, medium or slow. I think he said medium. Isn't that right?

MR. ARNESS: Yes.

* * * *

PLAINTIFF'S FINAL ARGUMENT

163 * * * children. Who doesn't know that? Furthermore, there were children playing on that bridge, and if he would have looked—he said he didn't see them. He didn't look. He is supposed to see what there is to be seen. And if you just shutter yourself behind the sentence "I didn't see," that just means, "I didn't look."

Their own witness, they brought that little boy Larry Brox, he was around seven years old then. He couldn't remember a great deal, naturally. It's been almost three years. He is ten now and at that time he was only about seven years old; a little more, a little less. However, he did testify that he was right on the bridge and he was standing somewheres around here, right in the middle of the dividing wall. That is the testimony of their own witness—

MR. ARNESS: Your Honor, I must object. The boy said that the wall was between him —

THE COURT: I am going to ask counsel to come to the bench.

(AT THE BENCH:)

THE COURT: I would rather not have any
164 discussion in the hearing of the jury.

What is your objection?

MR. ARNESS: I object to counsel misquoting the record.

THE COURT: Just what is the misquotation?

MR. ARNESS: He is just telling the jury that the boy was on the wall, on the side of the wall closest to the truck; whereas, the boy's testimony is clearly that the wall was between him and the truck. This is the little boy witness, and Mr. Yasmer is just—

THE COURT: You know, I was looking over my notes and I did not pay close attention to what you said. I am going to ask Mr. Nevitt to read that part.

(The record was read by the reporter.)

MR. YASMER: The officer testified that, too, Bramhall; absolutely.

THE COURT: Gentlemen, there is a doubt in my mind whether that is accurate, but it seems to me that is for the jury to decide. You have a right to contradict that in your summing up.

MR. ARNESS: Very well, Your Honor.

THE COURT: I think I will leave that to the jury.

* * * *

165 MR. YASMER: I say to you, ladies and gentlemen of the jury, as far as my personal recollection goes, I am not a hundred per cent, but I have a strong recollection that the little boy said he was standing in the middle of the divider, of the wall, alongside of it. And I also say that Officer Bramhall testified to two other boys standing there on the bridge, beside Dwight K. Reed, at the time when Mr. Block was approaching the bridge and proceeding north.

There were children on that bridge, they were playing. You can presume, and I submit I don't think those children were always standing still, I think they were moving around. They were there some few minutes, a couple of minutes before Mr. Block approached and entered the bridge. Therefore, I say to you he saw the

children there, he knew there was a playground. When you see children, that is a danger sign to any reasonable man or woman, children in the path of your car, that one should slow up and be on guard and be extra careful. The very sight of children in the path of your automobile calls for precaution.

* * * *

169 There were children there, and the officer testified to the children. He named the Brox boys, he named a Nathan boy and, of course, Karl or Dwight, was there, and it was near a playground. And when you go by a school you should slow down, and when you go by a playground or near a playground you should slow down, and when you go and when in your path there are children, you should be cautious.

* * * *

170 Now, of course, Mr. Kinkaid didn't see the children because Mr. Block was going north and the children were all on the north side playing. Mr. Kinkaid was going south, so he couldn't see the children. He was correct, their views were different.

Now, this is an open bridge about 178 feet long, the same on either end. I say to you, ladies and gentlemen of the jury, that if Mr. Block was driving properly he could have seen the children at the other end, too, before he got here. And if he was approaching a blind spot, that is when you go extra carefully.

* * * *

Now, another defense, Mister—and His Honor will tell you; this is important—that from the very unlawful speed here on the part of Mr. Block, you can infer negligence upon which to predicate a verdict for the plaintiff in this case.

* * * *

ALL RELEVANT PORTIONS OF JURY CHARGE

172 * * * This suit is brought by his father to recover damages for what we call the little boy's estate.

* * *

Your decision must be reached calmly and dispassionately, fairly and impartially, objectively and deliberately, solely on the evidence introduced at this trial, without any feeling or emotion such as sympathy on one side or anger on the other, or any other feeling or emotion.

* * * *

174 In case there is any conflict in the testimony, it is for you to decide what the fact was and where the truth lies; and in case more than one inference can be drawn from any part of the testimony, it is for you to determine what inference to draw.

* * * *

176 Consequently, the burden is on the plaintiff to show that, by some act or omission, the defendant has violated some duty which the defendant owed to the plaintiff, in this case the little boy who met his death, and that this act or omission was the proximate cause of the injury of which the plaintiff complains.

To put this same thought in a different way, the burden is on the plaintiff to show that the defendant was negligent in some way and that the defendant's negligence was a proximate cause or one of the proximate causes of the accident.

* * * *

177 * * * A proximate cause of an injury is some negligence which causes or contributes to cause injury and without which the injury would not have been sustained.

* * * *

The first question for you to determine is whether the defendant's driver was guilty of any negligence and, if so,

whether his negligence was a proximate cause or one of the proximate causes of the accident.

Plaintiff's counsel called as a witness Officer Bramhall, an experienced member of the Metropolitan Police Department attached to the Accident Investigation Unit. He testified that he arrived on the scene shortly after the accident and made the appropriate investigation. He testified that upon examination he found that the truck
178 had made 93-½ feet of skid marks. He described an experiment that he then performed and described some calculations that he made on the basis of that experiment and the formulas that he consulted, and he testified as a conclusion that he found that at the time of the accident the truck had been going at a speed of 35 miles an hour.

The maximum speed limit in that particular zone was 25 miles an hour, so that according to the policeman's testimony the truck was not exceeding the speed limit only by a mile or two or three, but was going ten miles in excess of the speed limit.

* * * *

If the truck was considerably in excess of the speed limit, that in itself may be considered by you, ladies and gentlemen of the jury, as evidence of negligence under our law and you may find on that basis that the truck driver was guilty of negligence; and if you so find,
179 then, of course, you have to take another step. Was the excessive speed one of the causes of the accident? Of course, if the truck had been going at a slow rate of speed, perhaps the boy might have been able to run to safety, or perhaps if the boy had been struck the impact would not have been as severe and might not have caused the boy's death. All of these matters are for you to consider, not for me. I am just calling them to your attention. What weight you should give to them, if any, is for you to determine.

* * * *

The defendant claims that, irrespective of whether the defendant's driver was or was not negligent, the little boy was guilty of what the law calls contributory negligence. Now, the law on that point is this: In case
180 of an adult or of a youth of mature years, contributory negligence is negligence on the part of the injured person which cooperated in some degree with the negligence of the defendant and helped to cause the injury. A person who is guilty of contributory negligence may not recover from another for the injury that he has suffered, or for death, if the injury results in death, even though the defendant was negligent.

Now, the reason for that rule of law is—and there is a reason for every rule of law—that every person is under a duty to use due care for his own protection, such care as would be used by a reasonably prudent person under the circumstances. Failure to use such due care constitutes contributory negligence, and a person who is guilty of contributory negligence may not recover damages.

However, on the issue of contributory negligence the burden of proof is on the defendant. In other words, the burden is on the defendant to show, by a fair preponderance of the evidence, that the deceased was guilty of contributory negligence.

What I have given you is the rule of law applicable to adults or to youths of mature years. The rule in regard to an infant of tender years, however, is entirely different. The law is realistic and, contrary to the impression of some people, it is based on common sense. The
181 law realizes that an infant of tender years cannot be expected to exercise the same discretion as an older person and therefore the law requires less of him, and the degree of care that is required of an infant of tender years depends upon his age and on his knowledge. For example, of a child of three years of age less caution would be required than of a child of seven years, and

of a child of seven years less than one of 12 or 15 years of age. In other words, the caution and due care required of a child must be proportioned and is according to the maturity, the age and capacity of the child, and this is to be determined in each case by the circumstances of that case. Whether an infant is capable of being guilty of contributory negligence under the facts of any case is a question of fact for you ladies and gentlemen to determine. It is for you to determine whether, considering the boy's tender years, under the circumstances of the case he should be held guilty of contributory negligence.

Now, in this case the truck driver testified that the boy ran in front of the truck and that the boy was only two or three feet in front of the truck when the driver says he saw him. Now, in the first place, it is for you to decide whether to accept this testimony. But even if you accept it, it is for you to decide whether the boy was mature enough so that he can be held guilty of
182 failure to use due care and therefore guilty of contributory negligence.

If you do find that the little boy was guilty of contributory negligence, then, too, your verdict must be in favor of the defendant, even if the defendant was negligent.

* * * *

I shall then proceed to discuss the rules of law governing the determination of damages in a death case. Damages for death must be limited to damages of a pecuniary nature; that is, a financial or money loss sustained as a result of the death by his next of kin. The law does not permit compensation for grief, sorrow, mental suffering or mental anguish caused by death of a member of one's family or other relatives. Such matters cannot be paid for in money and that is why the law gives no compensation for these sentimental matters, no matter how deep they may be. The law limits damages for death

183 to such sums as will fairly and reasonably compensate the members of the family of the deceased for any financial loss sustained by reason of the death. But the law provides that certain matters must be taken into account in arriving at what fair compensation would be for the financial loss. The first item, of course, is the amount of actual expense connected with the death, such as medical and hospital bills and burial expenses. Well, here there are no medical or hospital bills. The funeral bill was $723.40. You have to take that into account.

But beyond that the plaintiff is entitled to recover the value of the child's services during his minority. By that I mean this: From the time that a child is old enough to go to work until he reaches the age of 21, in the eyes of the law his earnings belong to his father, and you have a right to consider what this child might have earned when he reached a working age, be it 16, 17, or 18, what he might have earned from that time until he reached the age of 21. Of course, as against that you have to consider and deduct the expenses to which the parents would have been put in bringing up the child.

Still beyond that, you have a right to consider that parents may expect a contribution for their support, if need be, from their child, even after the child
184 reaches the age of 21. You have a right to consider that.

All of these matters you will consider in arriving at the amount of damages to be awarded to the plaintiff if you find a verdict in the plaintiff's favor. The amount of damages obviously must depend very largely on the good sense and the sound judgment of the jury, upon all the facts and circumstances of the case, involving such matters as the age of the child at the time of his death and other similar circumstances.

* * * *

MR. ARNESS: Your Honor, I would just like to repeat the objections I made earlier to the denial of
185 the prayers I entered, as a matter of form.

In addition to that, I think that Your Honor in saying in the beginning of his charge that the damages were to be awarded to the child's estate, I think in a wrongful death action the estate is not a party and no damage should be awarded to the estate.

THE COURT: I think I will correct that. Anything else?

MR. ARNESS: Yes. Some additional matters, I know Your Honor's views on, but if I may state them.

THE COURT: Of course.

MR. ARNESS: I object to—

THE COURT: You have to protect your client, naturally.

MR. ARNESS: Yes. I object to Your Honor's comments about the speed that were made in the nature of the charge during the course of my argument, because I thought they were tantamount to saying—

THE COURT: Just what particular point do you object to?

MR. ARNESS: I thought Your Honor precluded me from arguing that at a speed in excess of the stated speed limit is not necessarily negligence. That is what I was attempting to argue.

186 THE COURT: Yes, I said it was evidence of negligence. Of course, one or two miles in excess of the speed limit would not be, but 10 miles would be.

MR. ARNESS: Then I think Your Honor erred in saying that the law with reference to a child of tender years is entirely different from what you called a youth of mature years. It is different and Your Honor explained the difference, but I don't believe the phrase entirely—

THE COURT: Well, you don't like the word "entirely." Well, that is a matter of opinion.

MR. ARNESS: Also, I object to the submission of the various elements of damage, on the ground that there is

no evidence in this record to enable the jury to form any conclusion. There was no evidence—

THE COURT: You do not have to have evidence as to what kind of a job the little boy could have gotten when he reached the age of 18, for example. The law there is entirely theoretical, in order to enable some compensation to be paid for death of a child, that is all.

MR. ARNESS: And I have one other matter, Your Honor. I think as far as contributory negligence is concerned, that it is true that the jury should take into consideration the years of the child, but I do not believe that it is accurate to say that it is up to them to decide
187 whether or not to apply the doctrine in this case.

* * * *

THE COURT: I did say, at the beginning of my remarks, that this suit is brought on behalf of the estate of the little boy. Strictly speaking, it is brought in behalf of his next of kin, being his father and mother. I don't think that changes anything else that I have said or affects your work, at all.

* * * *

188 (The jury retired to the jury room at 12:02 p.m.)

* * * *

1:55 p.m.

THE COURT: You may bring in the jury.

(The jury resumed the jury box.)

189 THE COURT: Call the case.

THE DEPUTY CLERK: Reed vs. Gulf Oil Corporation. Mr. Yasmer, Mr. First, Mr. Arness.

THE COURT: Who is the foreman of the jury?

(Juror No. 4.)

THE COURT: Mr. Foreman, the Court has received your note reading as follows:

"Please let us see the part of law dealing with the judgment of a child contributing to negligence."

You may resume your seat.

I will be very glad to give you an additional explanation of that.

Now, an adult is required to use due care for his own safety, such as you and I would, and if an adult fails to use that and as a result of his failure he gets injured, he is guilty of contributory negligence and he cannot recover. But the law does not expect a little boy or a little child to use the same amount of care for his own safety as an adult would use. So that you have to have a different standard of what constitutes due care for a child and what constitutes due care for an adult, and what the standard should be is your own judgment.

In other words, in this case, applying it to this
190 case, considering the fact that this little boy was only seven years old, did he do something that you would not expect a seven-year-old child to do for his own safety; or to put it another way, can you say that, considering his age, what the child did here was negligent and careless.

If in the light of what you expect of a seven-year-old child you cannot say that he was careless, then he is not guilty of contributory negligence.

Do I make that clear, Mr. Foreman?

THE FOREMAN: You do to me.

THE COURT: It is clear to all of you? If not I shall be very glad to explain it a little further.

So that, if you find that this little boy, considering his age, did only what you might expect of any child that age, and that you cannot charge him with being careless, reckless and negligent, then he is not guilty of contributory negligence.

* * * *

JURY VERDICT

191 5:10 p.m.

THE COURT: You may bring in the jury.

(The jury resumed the jury box.)

THE DEPUTY CLERK: Will the foreman please rise. Mr. Foreman, has the jury agreed upon its verdict?

THE FOREMAN: Yes, it has.

THE DEPUTY CLERK: Do you find for the plaintiff or the defendant?

THE FOREMAN: The plaintiff.

THE DEPUTY CLERK: In what amount?

THE FOREMAN: Twenty thousand dollars.

* * * *

192 THE COURT: I have no quarrel at all with the verdict for the plaintiff. If this had been a jury-waived case I would have decided the case for the plaintiff on the strength of the policeman's testimony because I do not think you can hold a seven-year-old child or charge a seven-year-old child with contributory negligence in this case. It would have been different if the child was 10 or 12 years old. I have a high regard for the Accident Investigation Unit because I have seen their results in case after case, and I have the same regard for the Police Department generally, and I was very much impressed by the officer in this case.

However, I would be willing to entertain a motion for a remittitur, if you decide to make one.

* * * *

DEFENDANT'S FINAL ARGUMENT

* * * *

9 So, you have that issue to decide, really in two parts. One, did Mr. Block in driving this truck drive it in a way that a reasonable person under the same circumstances would not have driven? Now, that doesn't mean to decide any technical issue like whether or not he was going exact a certain number of miles per

hour. Was he acting and driving as a reasonable person would?

Now, there are many streets and many roadways in the District of Columbia where the speed limit is 25 miles an hour. Do reasonable people drive 25 miles an hour on all of them? On certain streets they do, on certain streets they don't. On Connecticut Avenue or Pennsylvania Avenue, Southeast, a car in the evening, going home from work, driving 25 miles an hour would be an absolute obstruction to traffic, now, wouldn't it?

10 THE COURT: Mr. Arness, I am not going to permit you to argue that it is permissible under certain circumstances to exceed the speed limit.

MR. ARNESS: No, I didn't argue that, Your Honor.

THE COURT: Well, that was the necessary inference of what you were arguing.

MR. ARNESS: Now, what—

THE COURT: I will instruct the jury to the contrary.

MR. ARNESS: Yes, Your Honor. I was merely arguing that they must decide this case as to whether Mr. Block was acting as a reasonable man.

THE COURT: But the regulation as to reasonable speed merely means there are occasions when going at the maximum speed limit may be unreasonable. It does not apply the other way, that you may exceed the speed limit when you think it is reasonable to do so.

Very well, proceed.

MR. ARNESS: Now, in addition, there is another issue that must be decided, that is, whether or not anything that Mr. Block did was a proximate cause of this accident. Now, the accident clearly happened, did it not, from the evidence that you have seen, at a point exactly at the end of this concrete wall. This red "X" as you will recall is the place where the police

11 officer put the point of impact. There were no skid marks before that point of impact. So the skid marks—the impact already occurred before there were the skid marks.

* * * *

2 OPINION OF THE COURT

THE COURT: This is an action to recover damages for the death of a seven-year-old boy. The jury found a verdict in favor of the plaintiff father for the sum of $20,000. The defendant now moves for judgment notwithstanding the verdict or, in the alternative, for a new trial, both on the ground that the verdict was contrary to the weight of the evidence and on the ground that the amount of damages awarded was excessive.

The little boy was struck and instantly killed by a truck of the defendant while he was running across the street in front of the truck. The accident took place in the 600 block of New Jersey Avenue, Southeast, near a viaduct.

The evidence amply sustains a verdict on the merits in favor of the plaintiff. The negligence of the defendant's driver was established by clear and convincing evidence. An experienced officer of the Metropolitan Police Department, attached to the Accident Investigation Unit, who made a thorough technical investigation, testified that in his opinion the truck was going at a speed of 35 miles an hour at the time of the accident. The maximum speed limit was 25 miles an hour. On this point the Court instructed the jury in a manner more favorably

3 to the defendant than perhaps the defendant was entitled to, because the Court did not instruct the jury that driving in excess of the speed limit, in violation of the regulation, was negligence as a matter of law, but limited itself to saying to the jury that it was evidence of negligence.

It was argued by able counsel for the defendant that there was no evidence that the high speed at which the vehicle traveled was a proximate cause of the accident.

The Court disagrees. It may well have been that if the truck had been going somewhat slower the little boy who was running across the street might have arrived at

a point of safety before he was struck. So, too, it might well have been that, even if the impact took place, the boy might not have been killed if the vehicle had been going at a slow rate of speed, because velocity has a direct bearing on the force of an impact and it is a well-known fact that, when an impact takes place, much more serious damages result if the vehicle was going fast than if it was going slowly.

Consequently, the Court is of the opinion that the jury had a right to find that the high speed of the vehicle was a proximate cause of the accident.

On the issue of contributory negligence, the Court ruled that the matter constituted a question of fact
4 for the jury in view of the tender age of the deceased. To be sure, if the deceased had been an adult or a minor over 18 years of age there would have been some basis for holding that the deceased was guilty of contributory negligence as a matter of law. Perhaps the age could even be set lower, although under the Criminal Statutes of the District of Columbia, a person under 18 years of age is not held to the same legal and moral responsibility and may not be convicted of a crime as a person over 18, and it would seem that if a person is not morally responsible for a criminal act because of immature age it is unreasonable to hold him responsible for the same degree of care as an adult. But it is not necessary to decide that and it is not necessary to determine at what age the line should be drawn. Surely, at the age of 7 an infant cannot be held liable for negligence as a matter of law.

The Court left to the jury the question as to whether, under the circumstances, the boy should be deemed to have been guilty of contributory negligence. The jury, in answering the question in the negative, as it must have been deemed to have done, was entirely within its rights and justified in reaching the result that it did.

The measure of damages is well established. In a death case, under the District of Columbia Statute, District of

Columbia Code Section 16-1201, which is modeled
5 on Lord Campbell's Act, there can be a recovery only for pecuniary damages. No award may be made for sentimental loss, mental anguish, grief or sorrow. This is the rule in most jurisdictions. In cases in which the deceased is an adult and a breadwinner of a family, the question as to how the damages should be computed is not too difficult to answer. It is a matter, more or less, of mathematical computation. The average earnings of the deceased may be considered, together with his prospects for increase, his life expectancy, and the amount thus reached must be reduced to its present worth by the use of actuarial tables. The problem is somewhat more difficult in case of an adult either without dependents or with relatives to whom the deceased made only partial or occasional contributions. The problem is still more difficult in case of a deceased infant of tender years.

The theoretical rule to be applied in case of the type last mentioned is clear. The parents of a minor are entitled to his earnings until he arrives at his majority. In addition to that, they have an expectation of a possibility of contributions in later life. Practical life indicates that this expectancy is a substantial element in the life of modern society. As against that there must be deducted the cost of bringing up the child. How to make
the necessary computation is, of course, a problem
6 that is in large part theoretical and somewhat nebulous, and the matter must be left to the good sense of the jury.

The formula to which I have referred is well established by the authorities in this jurisdiction. United States Electric Lighting Co., v. Sullivan, 22 Appeals D.C., 115, 136; National Homeophatic Hospital v. Hord, 92 Appeals D.C., 204, affirming 102 Fed. Suppl. 792; Rankin v. Shayne Brothers, 98 Appeals D.C. 214.

The question involves so many imponderables that it is difficult of solution because it comprises future possi-

bilities that are ordinarily beyond the ken of man. Nevertheless, the jury is permitted being instructed in this formula to reach a conclusion which it deems sound, subject, of course, to the inherent power of the Court to set a verdict aside.

When the verdict was returned my first impression was that it was indeed excessive. I felt, however, that I should give the matter further consideration and thought and examine the authorities, if any could be found.

There have been quite a number of cases in which large awards were made for children between the ages of 5 and 10 years of age, and an examination of these decisions throws a considerable light upon the question with which the Court is confronted.

7 In the case of Dixie Greyhound Lines v. Woodall, 188 Fed. 2d 535, which was decided under the law of Tennessee, the jury awarded damages in the sum of $20,000 for the life of a child six years old. The case was tried in the United States District Court for the Western District of Tennessee before Judge Boyd, an eminent and experienced member of the bench. He declined to disturb the verdict. The Court of Appeals for the Sixth Circuit, the bench consisting of Judge Simons, Judge McAllister and Judge Shackelford Miller, affirmed the judgment and expressly stated in its opinion that the verdict in the sum of $20,000 was not excessive as a matter of law.

As against that, to be sure, there is an opinion of the Fourth Circuit in United States v. Guyer, 218 Fed. 2d. 266, 269, in which the Court reduced an award made by the United States District Court for the District of Maryland under the Federal Tort Claims Act, the Court sitting without a jury, for the sum of $8,000 each for two children, one aged eight weeks and the other six and a half years. The Court of Appeals reduced the award from $8,000 to $5,000, indicating that an award in excess of $5,000 should not be sustained for the death of

a child of tender years in the absence of a showing of special circumstances.

There are many State cases, however, in which
8 the same situation was presented. In Union Transfer & Storage Co. v. Fryman's Administrator, 200 Southwestern 2d. 953, decided by the Court of Appeals of Kentucky, an award of damages in the sum of $20,000 for the death of a nine-year-old child was held not to be excessive. In Management Services, Inc., v. Hellman, 289 Southwestern 2d. 711, 721, decided by the Court of Appeals of Tennessee, the jury had returned a verdict for $35,000 for the death of a child eight years of age. The Trial Judge reduced the amount to be awarded to $20,000. The Court of Appeals held that the judgment of $20,000 could not be said to have been excessive. In New York, in Marianello v. Bloomquist, 105 N.Y. Suppl. 2d 188, the jury awarded the sum of $26,000 for the death of a five-year-old boy. The Court reduced the amount to $17,000.

In Carradine v. City of New York, 209 N.Y. Suppl. 2d. 143, 145, a verdict for $20,000 for the death of a nine-year-old boy was sustained by the Trial Judge. The case does not seem to have gone any higher.

The Court's research has been confined to jurisdictions in which the statutes did not allow recovery for any sentimental loss but limited the recovery to the pecuniary loss sustained by the next of kin.

In Connecticut, in Miner v. McKay, 145 Atl. 2d. 758, a
9 verdict for $36,000 for the death of a nine-year-girl was sustained and the Appellate Court refused to disturb it and affirmed the action of the Trial Judge.

The Court's study and research indicates that there have been quite a number of instances in which large awards similar to that involved in the instant case have been made and sustained, and the Court has discovered only one instance, the case in the Fourth Circuit to which reference has been made, where the opposite result was reached.

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9 girl was sustained and the Appellate Court refused to disturb it and affirmed the action of the Trial Judge.

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The decrease in the purchasing power of money is a substantial element that juries consider. I have refused to instruct the jury on the subject whenever I have been requested to do so, on the ground that this is a matter of fact and argument, but counsel are entitled to argue it in their summing up to the jury and the jury is entitled to consider it.

Counsel for the defendant calls attention to the fact, quite accurately, that there is no evidence as to the social or economic status of the family of the deceased and no basis to determine what the little boy's earnings might have been in due course, if he had lived. It may be assumed, therefore, in the absence of evidence to the contrary, that the family was of a low economic status and that, therefore, the little boy's earnings might not have been more than moderate; but this is a double-edged sword because a boy of a family of that type is likely to go to work earlier than a child of a family that sends its sons to college, and if this boy had gone to work at the age of 16 or 17, his earnings for four or five years would have belonged to his parents and they also had the expectation of possible contributions to their support in their old age.

Whether this Court would have awarded as large an amount as was awarded by the jury, is immaterial.

In the light of further reflection and the authorities that have been review, the Court feels that it should not interfere with the verdict. The Court is not unmindful of the fact that a verdict of a jury should not be ordinarily disturbed unless there is a very good reason for it. The Court finds no such reason.

The Court might add, in conclusion, that this is not a case where the jury might have been influenced by some dramatic circumstance or by some inflammatory remarks. Nothing of that kind occurred during the trial. Counsel for both sides tried this case on a very high plane and in a very objective, lawyer-like fashion.

In the light of this discussion, both motions will be denied.

* * * *

PLAINTIFF'S JURY INSTRUCTION

No. 5

It is ordinarily necessary to exercise greater care for the protection and safety of a young child than for an adult person who possesses normal physical and mental faculties. One dealing with children must anticipate the ordinary behavior of children. The fact that they usually cannot and do not exercise the same degree of prudence for their own safety as adults, that they often are thoughtless and impulsive, imposes a duty to exercise a proportional vigilance and caution on those dealing with children, and from whose conduct injury to a child may result.

FRANKLYN YASMER & STANLEY A. FIRST

By: .....
Attorneys for Plaintiff

* * * *

DEFENDANTS' REQUESTED INSTRUCTION NO. 1

Contributory negligence is negligence on the part of a person injured which combined in some degree with the negligence of another helps in proximately causing the injury of which he complains. One may be contributorily negligent by knowingly subjecting himself to a risk which is reasonably calculated to result in harm. In considering contributory negligence you are instructed that a minor is not held to the same standards of reasonableness as an adult and you must consider whether this particular child acted reasonably in the light of his age, education, training and experience. If you find that Dwight Reed was guilty of such negligence, you should find for the defend-

ants because one who is guilty of contributory negligence may not recover from another for injuries sustained.

* * * *

DEFENDANTS' REQUESTED INSTRUCTION NO. 2

The proximate cause of an injury is that cause which, in natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury, and without which the result would not have occurred. It is the efficient cause—the one that necessarily sets in operation the factors that accomplish the injury. It may operate directly or by putting intervening agencies in motion.

* * * *

DSFENDANTS' REQUESTED INSTRUCTION NO. 3

You are instructed that you may not guess or speculate as to the existence of any fact in this case. You must base your findings solely upon the evidence that has been adduced before you and upon any inferences reasonably deducible therefrom.

* * * *

DEFENDANTS' REQUESTED INSTRUCTION NO. 6

No inference of negligence whatever arises from the mere happening of the accident in this case. You are not to infer from the mere fact that an accident happened that some party or any party to this action was negligent. On the contrary, the legal presumption is that reasonable care was exercised by both parties. The burden of proof is upon the party charging negligence to overcome this presumption of due care by a preponderance of the evidence and to prove that the negligence, if established, was the proximate cause of the accident.

* * * *

DEFENDANTS' REQUESTED INSTRUCTION NO. 7

A person has a right to assume that others will perform their duty under the law and that such others are possessed of the normal faculties of sight, hearing and intelligence, and that those faculties are being used in the exercise of ordinary care, and he has a further right to rely and act on that assumption, provided, however, that this right does not exist when it is reasonably apparent to one, or in the exercise of ordinary care, would be so apparent to him, that another is not going to perform this duty or is not possessed of those faculties. A person is not justified in ignoring obvious danger although it is created by another's misconduct or physical condition.

* * * *

MOTION FOR A REDUCTION OF VERDICT PURSUANT TO TITLE 16-1201, DISTRICT OF COLUMBIA CODE, 1961 EDITION; MOTION TO SET ASIDE VERDICT AND TO ENTER JUDGMENT IN FAVOR OF DEFENDANT IN ACCORDANCE WITH ITS MOTION FOR DIRECTED VERDICT; AND IN THE ALTERNATIVE, MOTION FOR NEW TRIAL

Comes now the defendant in the above entitled cause and moves this Court to order a reduction of the verdict in accordance with the power given the Court by virtue of Title 16-1201, District of Columbia Code, 1961 Edition; defendant also moves the Court to set aside the verdict and to enter judgment for the defendant, notwithstanding the verdict, in accordance with defendant's motions for directed verdict; and in the alternative, defendant moves the Court to order a new trial for the reason that the verdict of the jury is contrary to the evidence, contrary to the weight of the evidence, and is the result of improper arguments and of certain errors in the Court's charge to the jury.

WHEREFORE, in consideration of this motion, and the memorandum of points and authorities attached hereto and by reference made a part hereof, this Court is respectfully requested to grant a reduction of verdict pursuant to Title 16-1201, District of Columbia Code, 1961 Edition; or to set aside verdict and to enter judgment in favor of defendant in accordance with its motions for directed verdict; or, in the alternative, to grant a new trial.

HOGAN & HARTSON

By /s/ John P. Arness
JOHN P. ARNESS

* * * *

* * * *

Civil No. 766-61

ERNEST E. REED, as Administrator of the Estate of Dwight K. Reed, deceased,

Plaintiff.

vs.

GULF OIL CORPORATION

Defendant.

NOTICE OF APPEAL

Notice is hereby given this 24th day of April, 1963, that defendant, Gulf Oil Corporation, hereby appeals to the United States Court of Appeals for the District of Columbia from the verdict and judgment of this Court entered on the 26th day of March, 1963 in favor of plaintiff, Ernest E. Reed, as Administrator of the Estate of Dwight K. Reed, deceased, against said defendant, Gulf Oil Corporation, and from the final judgment entered March 29, 1963 upon the denial of defendant's motion for judgment notwithstanding the verdict, filed pursuant to Rule 50 (b), Federal Rules of Civil Procedure, and defendant's motion for new trial, filed pursuant to Rule 59, Federal Rules of Civil Procedure.

JOHN P. ARNESS
Attorney for Gulf Oil Corporation
800 Colorado Building,
Washington, D. C.

* * * *

BRIEF OF APPELLEE

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,889

GULF OIL CORP.,

Appellant,

v.

ERNEST E. REED, as Administrator of the Estate of Dwight K. Reed, deceased,

Appellee.

Appeal from the United States District Court for the District of Columbia

---

FRANKLYN YASMER
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Attorneys for Appellee

WILSON - EPES PRINTING CO. - RE 7-6002 - WASHINGTON 1, D. C

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Attorneys for Appellee

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STATEMENT OF QUESTIONS PRESENTED

In the opinion of the appellee, the questions presented are:

1. Whether all the evidence in the case of the negligence of the defendant, and the inferences fairly and logically deductible from this evidence, was sufficient to be submitted to the jury on this issue?

2. Was there sufficient evidence on the issue of proximate cause to be properly submitted to the jury?

3. Whether the question of the contributory negligence of decedent, 7½ years old at the time of the occurrence, was properly submitted to the jury; and did the court correctly instruct the jury on the issue of contributory negligence?

4. Whether there was sufficient evidence on the issue of damages to support the verdict of the jury; and was the verdict excessive?

5. Whether the evidence supported the submission of Section 54 of the Traffic Regulations of the District of Columbia to the jury.

6. Whether the trial court correctly and fairly charged the jury on all the issues submitted to it, that is: (a) proximate cause, (b) contributory negligence, (c) prohibition against speculation (d) violation of traffic regulations as negligence per se, (e) the effect of uncontradicted evidence, and (f) damages.

7. Whether the court properly excluded, as hearsay, the attempt to have the police officer testify to statements of witnesses elicited by him during his investigation of the accident.

8. Was the argument of counsel within the framework of the evidence and the reasonable inferences of the evidence?

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TABLE OF CASES

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF CASE

Dwight K. Reed, the minor decedent, on August 23, 1960, at the time he was fatally injured, was 7½ years old. He was born on March 27, 1953 (J.A. 14) and had completed the second grade of elementary school. (J.A. 14) Earlier on the morning of the accident, he was playing with four other playmates about his own age on a

public playground equipped with the usual paraphernalia, such as swings etc., (J.A. 34) which playground was situated adjacent, but on a lower level, to the very place where the minor decedent was struck by a truck owned by the defendant Gulf Oil Corp. and at the time operated by its driver and mechanic, Harry R. Block. (J.A. 19, 34) From this public playground to the place of the accident, there are two paths by which the bridge could be reached. (J.A. 37) At the site of the accident, New Jersey Avenue becomes and goes over a bridge or viaduct above railroad tracks. (J.A. 16, 28, 30, 37) This bridge, that the defendant's driver proceeded over in a northerly direction prior to striking the minor decedent, is 178 feet long, approximately 40 feet wide, (J.A. 16) and is bordered at each side by a 5 foot high solid concrete wall. (J.A. 29, 30) Running through the center of this bridge is a concrete wall approximately 5 feet high. (J.A. 16, 29)

The plaintiff called as his witness, Metropolitan Police Officer James W. Bramhall, attached to the Accident Investigation Unit, who testified that 45 feet north of the north end of the bridge there were skin and blood marks on the street, indicating that the pedestrian was dragged from this point. These skin and blood marks continued on for 43 feet and at the end of the 43 feet there was a large pool of blood, indicating that was where the pedestrian came to rest. (J.A. 16) This made a total of 88 feet (J.A. 16) that the minor decedent was carried and dragged by the defendant's truck.

Officer Bramhall further testified that at the scene of the accident he made, what he called, a skid test. He turned the defendant's truck around, went back across the bridge and then headed in the same direction that the defendant's driver had been proceeding and drove the truck at the rate of 25 miles an hour and applied the brakes. He then measured the skid marks resulting,

which came to 46 feet 8 inches. He also testified that the weather was clear and dry; the road was macadam (J.A. 17); that considering all the factors, the length of the skids, the weather condition, and the road surface, he estimated the rate of speed the truck was traveling at the time it struck the minor decedent at about 35 miles per hour. (J.A. 18) There were 93½ feet in overall skid marks laid down by defendant's truck. (J.A. 15, 39)

Larry Brox was called by the defendant and testified that earlier that morning he and the minor decedent, whom he referred to by his middle name, Karl, were playing on the playground described here and that the decedent ran out across the street but he did not remember how close to the end of the north wall. (J.A. 34, 35) Among other things, Larry Brox testified that right before the accident occurred, there was on the bridge a boy by the name of Nathan Wood, who was in the front part of the bridge standing near the minor decedent; that he, Larry Brox, was standing in the middle of the bridge (J.A. 36) and also another boy, Robert Simpson, a tall boy, was playing there with them. (J.A. 36)

The witness Larry Brox also testified that at first he and Nathan Wood, and his brother Otto Brox, and Robert Simpson were all on the playground playing (J.A. 36); that the playground had swings and that there is a path leading up from the playground to the bridge; and it is a regular playground for children to play. (J.A. 37)

Of importance is the further testimony of Larry Brox that "some of us (boys) were chasing the others" and *that they (these children) were chasing around the bridge.* He further testified that Nathan Wood was standing on the cement rise that bordered the middle wall of the bridge not far from the minor decedent. (J.A. 38, 39)

Harry R. Block, the driver of the defendant's truck, testified that he was employed as a mechanic for the de-

fendant Gulf Oil Corp. for the past 15½ years; that he was 53 years old (J.A. 42, 43); that he was traveling about 25 to 30 miles per hour over the bridge and that there was no traffic proceeding in the same direction he was going at the time. (J.A. 43) It is noteworthy that Mr. Block testified *that while he was proceeding on the bridge for a full 178 feet, he did not see any children or any pedestrian ahead of him.* (J.A. 43) Just as he approached the end of the bridge, he saw a boy run out from the wall there right in front of his truck (J.A. 43) and not until then did he see anybody.

Block further testified that he had been over that particular bridge quite a few times before and that he knew the playground was there. (J.A. 44) On cross-examination Mr. Block's attention was called to the blackboard where there was a drawing of the bridge and playground and he was asked if he saw the three little boys standing on the bridge at various locations, where the prior testimony placed them. To all these questions, he answered that he did not see any of these three boys where the prior testimony placed them. (J.A. 45)

There was no testimony that Block, while approaching or proceeding over the 178 feet bridge, at any time blew his horn or slowed down.

In view of the abundant evidence of children playing and being on the bridge at the time in defendant's driver's direct and unobstructed view for at least 178 feet before the collision with the minor decedent, the trial court allowed Section 54 of the Traffic Regulations to be read to the jury (J.A. 31): ". . . drivers to exercise due care to avoid colliding with any pedestrial upon any roadway and shall give warning by sounding the horn when necessary *and shall exercise proper caution upon observing any child* . . . upon a roadway". (J.A. 32) It must become clear from the foregoing that there was an abundance of evidence to support the allowance of Traffic Regulation 54

in the plaintiff's case. It, therefore, cannot be said that the defendant's excessive and unlawful speed was the only act of negligence upon which the plaintiff's case was grounded, as contended by defendant.

Officer Bramhall, after being qualified, further testified that a vehicle proceeding at a speed of 25 miles per hour will travel 36.7 feet per second and at 35 miles per hour the vehicle will travel 51.3 feet per second. (J.A. 24) This shows that had the operator of the Gulf Oil truck proceeded at the lawful rate of 25 miles an hour, he could have brought the truck to a stop in 15 feet less distance than at 35 miles an our. However, in view of the tesimony of the children being in full view, a jury could expect a reasonable driver to proceed at a much slower speed than 25 miles an hour.

The plaintiff, as part of his case, also introduced the official autopsy record as follows: "Autopsy card No. 28225. D. C. Morgue, August 24, 1960, 1:00 p.m. "Name, Dwight K. Reed; color; age, 7 years; weight, 60 pounds; height, four feet four inches; sex, male. "Previous History, struck by truck. Clothes—" which has nothing to do with it—"There were extensive abrasions of both sides of the forehead, both malar regions and the chin, about the right elbow, forearm and wrist, just above the crest of the left ilium about both knees and back of right leg. There was a fracture of both bones of the right leg in the mid-third. There was a very extensive fracture of the skull, extending from the right temporal bone through the occipital bone into the left temporal bone and into the right parietal bone, with marked separation of the fragments and extensive brain damage. The internal organs were negative for pathology. "Present at autopsy, Mr. Salik M. Kaplan. "Cause of death, crushed H and S, crushed skull. "Performed by Dr. Rosenberg." (J.A. 30, 31)

Charles Kincaid testified that he was driving a mail truck south on New Jersey Avenue (proceeding in the opposite direction of the defendant's truck) and since there was a divider approximately five feet high running through the center of the entire length of the bridge, his view was obstructed as to the children on the other side of the wall in the north roadway of the bridge and, therefore, from the physical situation it was impossible for Kincaid to see the children on the other side of the wall where they undoubtedly were standing, as fully discussed elsewhere herein. Kincaid picked up the movement of the minor decedent, while on his side of the bridge, going toward the center of the street. The minor decedent was running at a medium gait. (J.A. 40, 41) Therefore, the fact that Kincaid did not see the children does not prove that the children were not on the bridge on the northerly side, as testified to by Officer Bramhall and Larry Brox.

It is to be remembered that this bridge also had a concrete wall on either side, as well as a concrete wall running through the center 63 inches high (J.A. 45)

It may be pointed out here that the physical aspect of this "bridge-roadway" with the children on it, including minor decedent, was such that the defendant's driver should have proceeded over it slowly and cautiously and with vigilance so that he would be in a position to meet the exigencies of the situation.

STATUTE INVOLVED

Title 16-1203, District of Columbia Code (1961 Edition) provides as follows:

Distribution of damages.

> The damages recovered in such action, except the amount specified by the verdict or judgment covering the reasonable expenses of last illness and burial, shall not be appropriated to the payment of the debts

or liabilities of such deceased person, but shall inure to the benefit of his or her family and be distributed to the spouse and next of kin according to the allocation made by the verdict or judgment, or *in the absence of such allocation, according to the provisions of the statute of distribution in force in said District of Columbia.*

SUMMARY OF ARGUMENT

The verdict and judgment rendered in this case is abundantly supported by the evidence adduced at trial on behalf of plaintiff and further bolstered by the defendant's evidence. In fact, the evidence of excessive and unlawful speed in combination with the crucial evidence of the several young children, besides the minor decedent, standing at various points on the bridge in full and unobstructed view of the defendant's driver, in his direct path of travel for a straight stretch of road over the length of the 178 foot bridge, is not seriously challenged.

The evidence of the defendant's excessive and unlawful speed in violation of the traffic regulations, combined with the uncontradicted evidence of the physical situation of the 178 foot walled in bridge with children of tender age standing at various points on the bridge and in the full and unobstructed view and direct path of the defendant's driver, and the further facts of the defendant's driver failing to heed all this and failing to take proper precautions, such as reducing his speed, or giving proper warning, or taking other measures, was undoubtedly the proximate cause of the fatal accident. At a minimum, it was sufficient evidence on the issue of proximate cause to be properly submitted to the jury.

The issue of the contributory negligence of the 7½ year old decedent was properly submitted to the jury on the evidence adduced at the trial.

The evidence on the issue of damages was sufficient to support the amount of the award. The jury had evidence

of the decedent's age, 7½ years old, his schooling, that his health was good, and that he was a bright child. His father testified and his mother was in court in the view of the jury. The evidence on this issue might have been embellished but would not have materially aided the jury in arriving at its verdict because of the inherent difficulty in establishing elements of damages in any wrongful death action involving a minor of such tender years. With proper instructions of the court, the jury is allowed considerable latitude in exercising its judgment in arriving at the amount of damages.

The jury verdict rendered in the amount of $20,000.00 is not excessive in the light of present day economic conditions.

The court properly allowed Section 54 of the traffic regulations as part of plaintiff's case in view of the evidence of the children, ranging from 7 to 9 years of age, standing at various points of the bridge at the time of the accident in defendant's full view and direct path, with one child at the south end of the bridge (the side from which the defendant's driver approached the bridge), another child standing in the middle of the bridge, and another child standing on the same side as the decedent, near the decedent but in front of him; and the further evidence that the driver of the Gulf Oil truck nevertheless, in disregard of Section 54, proceeded over the full length of the bridge (178 feet) at a continuous speed of at least 35 miles an hour until he collided into minor decedent, without reducing his speed, blowing his horn or taking other precautions as required by Section 54 of the traffic regulations.

The Court correctly charged the jury on all the issues submitted to it. Considering the entire charge, the court's instructions were entirely fair and the defendant was in no way prejudiced.

The court properly excluded, as hearsay, the police officer's testimony concerning statements elicited by him, and not spontaneous, in the course of his investigation of the accident.

ARGUMENT

A. The Defendant's Negligence Was the Proximate Cause of the Accident.

1. *The excessive and unlawful speed, combined with the facts of the adjacent playground and young children on the bridge in unobstructed view for 178 feet, was the proximate cause of the fatal accident.*

It is practically conceded by the defendant that its driver was negligent. The evidence that the defendant's driver was proceeding at the excessive and unlawful speed of at least 35 miles an hour in violation of the traffic regulations at the time of the accident, and for a distance of 178 feet to the point of impact with the minor decedent, appears to be conceded by the appellant or, at least, not seriously challenged. The main argument urged by appellant is that this negligence was not the proximate cause of the accident. Throughout appellant's argument, he chooses to completely ignore the other significant and vitally important evidence clearly and irrefutably established in this case. This is the evidence of the public playground equipped with swings etc. right adjacent to the place of the accident with two paths leading from this playground where children could reach the bridge. The defendant's driver admitted he knew of this playground as he had been over the same bridge before.

The uncontradicted evidence also is that at least three children, ranging in ages from 7 to 9 years old, besides the minor decedent, were actually at various points on that bridge as the defendant's driver was approaching, and also at the time of the accident were standing on

the bridge, and that he (the driver) had a full and unobstructed view as he was approaching the bridge in a northerly direction and proceeded over it a distance of 178 feet. In the face of all this, he callously operated the truck continuously for at least 178 feet, the length of the bridge, at the speed of 35 miles an hour.

At the trial the defendant's operator testified that he did not see any children or any pedestrians or anything as he approached the bridge and proceeded over its entire length until he came to the very north end of it and a few feet before the impact, in contrast to the clear and overwhelming evidence that these children were on the bridge.

The jury had an opportunity to observe the driver while he was giving his testimony and it was for the jury to weigh the testimony, to give it what credibility they saw fit, and to draw their own inferences and conclusions as to whether the operator was telling the truth when he said he didn't see the children or whether he saw the children on the bridge, including the minor decedent, for some distance before the impact. From the evidence the jury could have further concluded that the defendant's driver had ample notice and warning for a considerable distance before he reached the north end of the bridge that children of tender ages were in his direct path and he should have been given adequate warning of his approach by blowing his horn, reducing his speed considerably or even bringing his truck to a complete stop. All this evidence formed a substantial basis to submit the question of proximate cause to the jury.

Many cases hold that when a driver is put on notice that children are nearby, evidence of excessive speed is enough to submit the question of proximate cause to the jury.

In *Standard Oil Co. of New York* v. *Johnson* (1924), 299 Fed. 93, the facts were very similar to the instant case. A boy, 14 years old, with others, was crossing diago-

nally over a bridge, which spanned railroad tracks, when he was struck and killed by a motor truck, which had moved onto the bridge without giving any warning. There was evidence that a train was passing under the bridge and that the smoke obscured the view and the noise deadened the sound of the truck. It was held that the question of the driver's negligence and the boy's contributory negligence were for the jury. That case pointed out that three or four boys had crossed from the middle of the bridge, diagonally across the street, toward the sidewalk; then the Johnson boy followed pretty close after another boy just ahead of him proceeded, as the defendant's truck moving 6 to 8 miles an hour came over the bridge. It was conceded that the driver did not blow his horn or give any warning of any kind. The court, in its opinion, said: ". . . various rational inferences consistent with due care were open to the jury, such as that the driver, without sounding his horn, drove his truck through blinding smoke toward several boys who had the same right to safe use of the street he had.

In the case of *Frank* v. *Cohen*, 288 Pa. 221, 135 A. 624, the defendant approached a place where young school children could be seen on the streets. The Court said, in substance, the driver should have been on guard. Children are capricious; they act heedlessly, without warning, darting here and there with the exuberance of youth. No law or court edict will stop them. We can only warn those who meet them to be on the lookout.

In *Morrison* v. *Flowers* (1923), 308 Ill. 189, 139 N.E. 10, the defendant was driving fast in the city; a boy 8 years old, was on the sidewalk and suddenly crossed the bridge in the path of defendant's automobile. The verdict held for the plaintiff. The court, in substance, said that the accident was the direct result of the unreasonable and dangerous speed of the defendant.

In *J. F. Darmody* v. *Reed*, 60 Ind. App. 662, 111 N.E. 317, a 6 year old child, walking with his uncle on the sidewalk, stepped onto a driveway and was hit instantly by the defendant. The defendant turned off the street and into the driveway, giving no warning. The court held for the plaintiff.

See, e.g. *Pisarek* v. *Singer Talking Machine Co.* (1926), 185 Wisc. 92, 200 N.W. 675; *Taggert* v. *Collins* (1924), 210 App.Div. 671, 206 N.Y. Supp. 635; *Routh* v. *Weakley* (1916) 97 Kan. 74, 154 Pac. 218; *Ayers* v. *Ratchesky* (1913), 213 Mass. 589, 101 N.E. 78; *Lynch* v. *Shearer* (1910), 83 Conn. 73, 75 A. 88; *Jean* v. *Nester* (1927), 261 Mass. 442, 158 N.E. 893; *Silberstein* v. *Showell*, F. & Co. (1920) 267 Pa. 298, 109 A. 701; *Fannon* v. *Morton* (1923) 228 Ill. App. 415; *Akers* v. *Fulkerson*, (1913) 153 Ky. 228, 154 S.W. 1101.

DISTINGUISHING THE DEFENDANT'S CASES

In *Huber* v. *Anderson* (1946), 355 Pa. 247, 49 A. 2d 628, a child on a sled ran into the wheel of the defendant's automobile. The case, unlike the instant case, was completely devoid of any evidence showing that there were children about. In fact, the court went on to say: "On the other hand, where a driver can see children on a cross street or knows or ought to know that children are riding on a hill, he is required to give warning of his approach and take other reasonable actions to guard against accident, consistent with the circumstances". The court also commented that the evidence on the defendant's speed was vague and unsatisfactory. Whereas, in the instant case, there was very definite evidence that the Gulf Oil truck was going 35 miles an hour.

Likewise, in *Mowrey* v. *Schulz*, (1941) 230 Iowa 102, 296 N.W. 822, there was no evidence to put the driver on notice that children were in his path. The plaintiff was a

9 year old boy who rode his bike out of an alley in front of defendant's automobile.

In *Crutchley* v. *Bruce* (1932), 214 Iowa 731, 240 N.W. 238, similarly, there was no evidence that the driver was alerted to the presence of children in close proximity to his automobile. It is interesting to note that two judges dissented.

Underwood v. *Fultz* (1958), 331 P.2d 375. Here, there was also no evidence to show that the driver was forewarned that children were in the vicinity.

2. The trial court properly charged the jury on the issue of proximate cause.

When the entire instructions of the court on the issue of proximate cause are considered, it must be concluded that the court fully and correctly stated the law as it applied to the facts in the case and was entirely fair to defendant. The court stated: "Consequently, the burden is on the plaintiff to show that, by some act or omission, the defendant has violated some duty which the defendant owed to the plaintiff, in this case the little boy who met his death, and that this act or omission was the proximate cause of the injury of which the plaintiff complains. To put this same thought in a different way, the burden is on the plaintiff to show that the defendant was negligent in some way and that the defendant's negligence was a proximate cause or one of the proximate causes of the accident. A proximate cause of an injury is some negligence which causes or contributes to cause injury and without which the injury would not have been sustained". (J.A. 57, 58)

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B. Contributory Negligence

1. *The trial court rightfully submitted to the jury the issue of decedent's contributory negligence.*

This deceased child, 7½ years old, acted as could be expected of a child of his age. It would have been error for the court to say that under the facts in this case this child was guilty of contributory negligence as a matter of law.

A landmark case of our court dealing with the question of contributory negligence of minors, is *Barstow* v. *Capitol Traction Co.*, 29 App. D. C. 362. Briefly the facts in that case, as the court will recall, are as follows. A 9 year old boy and his 4 year old sister ran alongside of a trolley car. The motorman saw them and they talked to each other. The boy slipped and his foot was crushed by the wheel of the streetcar. The trial court directed a verdict for defendant. Upon appeal, the court reversed the lower court and said that these facts constituted a jury question.

In the Barstow case was quoted *Washington & G. R. Co.* v. *Gladman*, 15 Wall 401; 21 Law Ed. 114. The facts, a 7 year old boy attempted to run across the tracks in front of a moving horse car in the District of Columbia. Before he got across, he turned suddenly to run back. He was struck by the horse. The driver of the horse-car was talking to someone and not looking ahead. The question of the boy's contributory negligence went to the jury and the Court of Appeals said, in sustaining the trial judge, "The rule of law in regard to the negligence of an adult, and the rule in regard to that of an infant of tender years, is quite different". (practically the same language as used by the trial court in charging the jury on contributory negligence in the instant case)

In *Baltimore etc.* v. *Webster*, 6 App. D.C. 182, the Court of Appeals, in passing on the correctness of sub-

mitting to the jury the question of contributory negligence of a 12 year old boy, said: "The question in all such cases is whether the child has exercised such care as was reasonably to be expected from a person of his age and capacity, and the mere fact that he was old enough to know the probable consequences of the act which caused his injury will not conclusively determine that he was negligent in a degree to defeat his right to recover since it is not to be expected that a child will exercise the measure of prudence or caution in avoiding danger that we expect of an adult".

The Supreme Court of the United States in the case of *McDermott* v. *Severe*, 202 U.S. 600, 609; 50 Led. 1162, 1168, 26 Sup. Ct. Rep. 709, states, in its opinion, ". . . for we all know how prone the average 9 year old boy is to race with anything that moves".

The court in *Union P. R. Co.* v. *McDonald*, 152 U.S. 262, 277; 38 Led. 434, 441, 14 Sup. Ct. Rep. 619, quoted approvingly from Judge Cooley in a Michigan case: "Children, wherever they go, must be expected to act upon childish instincts and impulses; and others who are chargeable with a duty of care and caution towards them must calculate upon this, and take precautions accordingly".

In the instant case, the court further charged as follows: "The defendant claims that, irrespective of whether the defendant's driver was or was not negligent, the little boy was guilty of what the law calls contributory negligence. Now the law on that point is this: In the case of an adult or a youth of mature years, contributory negligence is negligence on the part of the injured person which cooperated in some degree with the negligence of the defendant and helped to cause the injury. A person who is guilty of contributory negligence may not recover from another for the injury that he has suffered or from death, if the injury results in death, even though the

defendant was negligent. The reason for that rule of law is . . . every person is under a duty to use due care for his own protection and such care would be used by a reasonably prudent person under the circumstances. Failure to use such due care constitutes contributory negligence, and a person who is guilty of contributory negligence may not recover damages.

The rule in regard to an infant of tender years, however, is entirely different. The law is realistic and, contrary to the impression of some people, it is based on common sense. The law realizes that an infant of tender years cannot be expected to exercise the same discretion as an older person and therefore the law requires less of him, and the degree of care that is required of an infant of tender years depends upon his age and on his knowledge. . . . In other words, the caution and due care required of a child must be proportioned and is according to the maturity, the age and capacity of the child, and this is to be determined in each case by the circumstances of that case. Whether an infant is capable of being guilty of contributory negligence under the facts of any case is a question of fact for you ladies and gentlemen to determine. It is for you to determine whether, considering the boy's tender years, under the circumstances of the case he should be held guilty of contributory negligence."

It is plain and beyond doubt that the above instructions quoted from the Court on the issue of contributory negligence were clear and correct and, if anything, more favorable to the defendant than to the plaintiff.

It can readily be seen that the Court did not charge the jury that the violation of a traffic regulation is negligence per se but, to the contrary, instructed the jury to consider speed as an inference of negligence on the part of the defendant's driver.

C. There Was Sufficient Evidence on the Issue of Damages.

Mr. Ernest E. Reed, the father of minor decedent and the duly qualified administrator, testified that he was a resident of the District of Columbia since 1941; that he was the father of the decedent Dwight K. Reed (J.A. 13); that the minor decedent was born on March 27, 1953 (J.A. 14); that the minor decedent attended the Gidding School and was in the second grade (J.A. 14). He further testified that the boy's health was very good up until the time of his death (J.A. 14) and that he was a bright and alert child for his age. (J.A. 15) This was sufficient evidence to support an award of damages for the wrongful death of a minor 7½ years of age. This evidence could have been embellished but no additional evidence could have been adduced by the plaintiff to aid the jury.

The courts have held that the amount of damages to be awarded must be based usually on the good sense and sound judgment of the jury because this amount cannot be computed by any mathematical formula. The question of damages in these situations is inherently a difficult one and, of necessity, must be submitted to the jury with proper instructions by the court. It appears that in this connection the judge's charge to the jury is the important factor. In the instant case, the court fully and correctly charged the jury on the law and it can be said that the charge on this issue was extremely favorable to defendant. The Court's charge: "I shall then proceed to discuss the rules of law governing the determination of damages in a death case. Damages for death must be limited to damages of a pecuniary nature; that is, a financial or money loss sustained as a result of the death by his next of kin. The law does not permit compensation for grief, sorrow, mental suffering or mental anguish caused by death of a member of one's family or other relatives. * * * The law limits damages for death to such sums as will fairly and reasonably compensate the members of the family of the deceased for any financial loss sustained by reason of

the death. But the law provides that certain matters must be taken into account in arriving at what fair compensation would be for the financial loss. * * * But beyond that the plaintiff is entitled to recover the value of the child's services during his minority. By that I mean this: From the time that a child is old enough to go to work until he reaches the age of 21, in the eyes of the law his earnings belong to his father, and you have a right to consider what this child might have earned when he reached a working age, be it 16, 17, or 18, what he might have earned from that time until he reached the age of 21. Of course, as against that you have to consider and deduct the expenses to which the parents would have been put in bringing up the child. Still beyond that, you have a right to consider that parents may expect a contribution for their support, if need be, from their child, even after the child reaches the age of 21. * * * All of these matters you will consider in arriving at the amount of damages to be awarded to the plaintiff if you find a verdict in the plaintiff's favor. The amount of damages obviously must depend very largely on the good sense and the sound judgment of the jury, upon all the facts and circumstances of the case, involving such matters as the age of the child at the time of his death and other similar circumstances." (J.A. 60, 61)

The court corrected itself and advised the jury that the suit was brought in behalf of decedent's next of kin, being his father and mother (J.A. 63)

D. The Verdict of $20,000.00 Is Not Excessive and Should Be Allowed To Stand.

In *Rankin* v. *Shayne Bros.* (1956), 98 U.S. App. D.C. 214, 234 Fed. 2d 35, the Court said: "This court, like court's generally, has been reluctant to set aside jury awards for personal injuries on the ground of either excessiveness or inadequacy . . .", citing *Coco Cola Bottling Works* v. *Hunter*, 95 U.S. App. D.C. 83, 219 F. 2d 765; *National Homeopathic Hospital* v. *Hord*, 92 U.S. App. D.C. 204, 204 Fed. 2d 397.

In the case of *Dixie Greyhound Lines* v. *Woodall*, 188 Fed. 2d, 535 Tenn., the jury awarded damages of $20,000.00 for the life of a child, 6 years old. The Court of Appeals for the Sixth Circuit confirmed the judgment and expressly stated in its opinion that the verdict of $20,000.00 was not excessive.

In *Union Transfer & Storage Co.* v. *Fryman's administrator*, 200 S. W. 2d, 953, decided by the Court of Appeals of Kentucky, an award of damages in the sum of $20,000.00 for the wrongful death of a 9 year old child was held not to be excessive.

In *Management Services Inc.* v. *Hellman*, 289 S.W. 2d, 711, 721, decided by the Court of Appeals of Tennessee, the jury had returned a verdict of $35,000.00 for the death of a child, 8 years old. The trial judge reduced the amount to $20,000.00. The Court of Appeals held that the judgment of $20,000.00 could not be said to be excessive.

In *Miner* v. *McKay*, 145 Conn. 622, 145 A. 2d 758, a verdict of $36,000.00 for the death of a 9 year old girl was sustained and the Appellate Court refused to disturb it.

E. The Trial Court Correctly and Fairly Charged the Jury on All the Issues Submitted to It.

Considering the entire charge, the court's instructions were entirely fair and adequate and the defendant was in no way prejudiced. The defendant's instructions which were denied by the court were fully and correctly covered by the judge's charge in his own language. As previously discussed, the court's own charges on negligence, contributory negligence, and proximate cause, correctly and adequately covered those subjects.

F. The Court Properly Excluded Hearsay Evidence.

The court sustained plaintiff's objection to Officer Bramhall repeating statements obtained by him from witnesses at the scene of the accident. The court ruled after he

heard testimony on the manner in which the statements were elicited. These statements were not spontaneous but were elicited by Officer Bramhall upon questioning in the course of his routine investigation some time after the accident happened. (J.A. 25, 26) The court further commented that these witnesses were available to testify and the plaintiff would then have an opportunity to cross-examine them. (J.A. 27) Defendant cites the case of *Beausoliel* v. *United States*, 71 App. D.C. 111, 107 Fed. 2d, 292 (1939). On page 295, the court stated the general rule as follows: "What constitutes a spontaneous utterance such as will bring it within the exception to the hearsay rule must depend necessarily on the facts peculiar to each case, and be determined by the exercise of sound judicial discretion which should not be disturbed on appeal unless clearly erroneous".

G. The Court Properly Allowed Section 54 of the Traffic Regulations.

This regulation specifically deals with the proper precaution to be exercised by the driver of a vehicle upon observing any child upon a roadway. Its importance is such that it will be set out again, in part:

> "Notwithstanding the foregoing provisions of this article, every driver of a vehicle shall exercise due care to avoid colliding with any pedestrian upon any roadway and shall give warning by sounding the horn, when necessary, and shall exercise proper precaution upon observing any child or any confused or incapacitated person upon a roadway."

The testimony of Officer Bramhall and Larry Brox placing 4 or 5 children, ages 7 to 9, on the bridge-roadway was the basis for submitting Section 54 to the jury. It will be recalled that one of the children was at the south end of the bridge, from which the defendant's driver approached, and that the minor decedent was at the north end of the bridge when he was struck and the distance be-

tween the two was about 178 feet, the full length of the bridge. There was another child standing on the bridge on the same side as minor decedent but ahead of him.

H. Argument of Counsel.

The argument of counsel was based entirely on the evidence in the case and the inferences properly deductible therefrom. The court allowed counsel for plaintiff to comment about the children on the bridge and the fact that Mr. Block, the defendant's driver saw the children there, including the minor decedent or could have seen the children, including the minor decedent as he approached the bridge and while proceeding over the bridge, and that he knew of the playground situated there, by his own admission. Counsel further argued that when one sees children in the path of his car, that is a danger sign to any reasonable man or woman, and that a driver should reduce his speed and be on guard and be extra careful and cautious. (J.A. 56) This argument is amply supported by the evidence.

CONCLUSION

It is respectfully submitted that no error occurred in the trial of this case which affected the rights of the appellant. The substantial evidence developed during trial fully supported the verdict of the jury. The jury was fairly and adequately instructed by the court. It is respectfully submitted that the verdict and judgment should be affirmed.

Respectfully submitted,

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BRIEF OF APPELLANT

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,889

GULF OIL CORP.,
Appellant,

v.

ERNEST E. REED, as Administrator of the Estate of Dwight K. Reed, deceased,
Appellee.

Appeal from the United States District Court for the District of Columbia

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QUESTIONS PRESENTED

1. In order to sustain plaintiff's recovery in a tort action, must there be evidence which would form the basis for a rational conclusion that the negligence charged was a proximate cause of the accident?

2. Did the trial court err in holding that excessive speed is always a proximate cause of the accident?

3. When a seven and one-half year old child deliberately leaves a place of safety and runs into the path of a motorist with the intention of attempting to race across in front of the vehicle, is he chargeable with contributory negligence as a matter of law?

4. Assuming that contributory negligence should have been submitted to the jury, did the trial court err in submitting the legal issue of capability to the jury and in its definition of the law to be applied?

5. Did the trial court err in admitting traffic regulations into evidence for which, admittedly, there is no evidentiary support?

6. Did the trial court err in refusing to follow the criteria established by this Court of Appeals when it excluded proffered spontaneous exclamations?

7. Did the trial court err in its charge to the jury on the issues of (a) proximate cause, (b) contributory negligence, (c) prohibition against speculation, (d) violation of traffic regulations as negligence per se, (d) the effect of uncontradicted evidence, and (f) damages?

8. Did the trial court err in refusing to exclude jury arguments based upon contentions not in the case and factual assertions not supported by the evidence?

9. Did the trial court err in submitting the issue of damages to the jury upon a speculative and conjectural

basis to the jury and in the absence of proper evidentiary support?

10. May a plaintiff, who disdains his burden to prove damages, be held entitled to retain a substantial verdict which has no substantial evidentiary support?

11. Should this Court, as minimal relief, reduce the verdict pursuant to its statutory authority under Title 16-1201, District of Columbia Code (1961 Edition)?

INDEX

TABLE OF CASES

* Cases marked with asterisks chiefly relied upon.

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TREATISES

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IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,889

GULF OIL CORP.,
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ERNEST E. REED, as Administrator of the Estate of Dwight K. Reed, deceased,
Appellee.

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

The jurisdiction of the United States District Court for the District of Columbia was invoked pursuant to Title 11-305,306, District of Columbia Code (1961 Edition). The trial court entered final judgment March 29, 1963 (J.A. 72) upon the denial of defendant's motion for judgment notwithstanding the verdict, filed pursuant to Rule 50(b), Federal Rules of Civil Procedure, of defendant's alternative motion for new trial, filed pursuant

to Rule 59, Federal Rules of Civil Procedure, and of defendant's motion for reduction of verdict, filed pursuant to Title 16-1201, District of Columbia Code (1961 Edition) (J.A. 75), which motions were filed subsequent to the verdict taken and judgment entered by the court on March 26, 1963. (J.A. 65) Notice of appeal was filed April 24, 1963. (J.A. 77) This Court has jurisdiction pursuant to the provisions of Title 28, U.S.C.A. § 1291.

STATEMENT OF CASE

On March 13, 1961 a complaint against the Gulf Oil Corp. and its employee, Harry Block, was filed by the administrator of the estate of Dwight K. Reed, deceased. (J.A. 3) The first count sought damages for personal injuries under Title 12-101, District of Columbia Code (1961 Edition), the District of Columbia survival act. The second count sought damages under Title 16-1201, District of Columbia Code (1961 Edition), for wrongful death. The first count was frivolous in view of the fact that death was instantaneous, and a verdict upon it was eventually directed by the court, with the consent of plaintiff's counsel. (J.A. 46-47) In the complaint plaintiff alleged that the decedent, a 7½ year old boy, was struck by a truck owned by defendant, Gulf Oil Corp., and operated by the defendant, Harry R. Block, its employee, within the six hundred block of New Jersey Avenue, S.E., in the District of Columbia, on August 23, 1960. In the answer (J.A. 7) filed on behalf of both defendants on April 4, 1961, there was a denial of any negligence which proximately caused the death of plaintiff's decedent. In addition, the affirmative defense of contributory negligence was asserted. At the pre-trial (J.A. 10-11) on January 10, 1963 plaintiff claimed that the accident occurred because the defendant operator failed to give full time and attention to the operation of his truck, failed to keep a proper lookout, operated at

an excessive rate of speed, and failed to keep the truck under proper control so as to avoid colliding with a pedestrian. Plaintiff also relied upon the doctrine of last clear chance.[1] Defendants reasserted their defenses and specifically claimed that the decedent was contributorily negligent in that he deliberately ran across in front of the truck in an attempt to beat it, failed to yield the right of way, crossed the street other than at a crosswalk, darted out from a protected area when the truck was so close that it could not be stopped, and played in the street. The only special damage alleged was a $723.40 funeral bill.

The case came on for trial before United States District Judge Alexander Holtzoff on March 20, 1963. (J.A. 12) Plaintiff's counsel called but two witnesses. The first was the administrator, Ernest E. Reed, 5270 Chillum Place, N.E. (J.A. 13) He testified that he was the father of the decedent (J.A. 13), that he had resided in the District of Columbia since 1941 (J.A. 13), that the deceased was born March 27, 1953 (J.A. 14), and had been in attendance at the Gidding School, where he was about to enter the third grade (J.A. 14). He testified further that the boy's health had been very good up until the time of his death (J.A. 14), that he was 4 feet 4 inches tall in his stocking feet (J.A. 15), and that he was a bright, alert child for his age. (J.A. 15) No other questions were asked of Mr. Reed and, of course, he gave no further testimony.

The other witness called by plaintiff's counsel was Accident Investigation Unit Police Officer James W. Bramhall (J.A. 14, 15), who testified that he investigated the fatal accident. (J.A. 14) He said he arrived on the

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[1] None of the various contentions except excessive speed were established in the evidence and the trial court sent the case to the jury for determination upon the excessive speed allegation solely. (J.A. 51)

scene of the accident 13 minutes after it had occurred. (J.A. 26) He was the first investigating police officer to arrive. (J.A. 24) When he got to the scene people were gathered around and there was still the excitement of the accident hanging in the air. (J.A. 25) He made certain observations and certain inquiries and ascertained that there were three eye witnesses to the accident, Nathan Wood, Larry Brox and Charles Kincaid (J.A. 25) Counsel for defendant asked the police officer to state what spontaneous exclamations he obtained from Larry Brox and Nathan Wood. (J.A. 25) However, the trial court excluded the proffered testimony, ruling as a matter of law that it was hearsay. (J.A. 25) This ruling was made upon the misconception that answers given to an inquiring police officer are not spontaneous exclamations as a matter of law. (J.A. 25-26) Officer Bramhall testified that the point of impact occurred in the north bound lane, right at the end of the center wall on the north end of the bridge. (J.A. 28) At that place New Jersey Avenue goes over a bridge or viaduct above railroad tracks (J.A. 16, 28, 30), is approximately 40 feet wide (J.A. 16), and is bordered on each side by a 5 foot high solid concrete wall. (J.A. 29-30) The single north bound lane is separated from the single south bound lane by a center 5 foot high, solid concrete wall, which is 178 feet long. (J.A. 16, 29) There were skid marks from the truck which indicated that it had been proceeding in the north bound lane. (J.A. 19) They were 93½ feet in overall length, which means that they were actually less than that by the length of the truck. (J.A. 15, 39) The point of impact on the truck was just above the left headlight. (J.A. 28) From the skid marks the investigating police officer estimated the truck's speed to have been approximately 35 miles per hour. (J.A. 18) The legal rate of speed was 25 miles per hour. (J.A. 18) Officer Bramhall took two photographs, exhibits No. 6 and 8, which demonstrated that

the truck driver could not have seen the pedestrian because of the 63 inch high solid concrete wall. (J.A. 27) The only other evidence introduced by plaintiff was a funeral bill in the amount of $723.40, an autopsy card, a stipulation that death was instantaneous, and two traffic regulations, Section 22(a) and Section 54. (J.A. 30-32) Section 22(a) is a speed restriction regulation to which defendant made no objection because there was some evidentiary support. (J.A. 31) Section 54 is a regulation which requires a driver to take special precautions upon observing any child or any confused or incapacitated person on a roadway; defendants strenuously objected to this regulation upon the ground that there was no evidence that there was any child in a position to have been seen, and, accordingly, there was no evidentiary basis for the regulation. (J.A. 31-32)

At this stage defendant moved for a directed verdict upon the ground that there was no evidence of actionable negligence in that plaintiff had failed to adduce any evidence as to the circumstances under which the accident occurred and as to the issue of proximate cause. (J.A. 32) The trial court ruled that the evidence of speed alone was sufficient to create a question for the jury and stated its legal conclusion that speed is always a proximate cause of an accident because the resulting injuries are necessarily more severe when the vehicle is travelling at a greater rate of speed. (J.A. 21, 33, 48)

In light of the fact that plaintiff failed to call any of the eye witnesses to the accident and completely disregarded his burden of proof with respect to establishing the circumstances of the accident, and the damages which may have resulted therefrom, the defendant was faced with the choice of proceeding forward, thereby assuming the burden of proof which should properly have been borne by plaintiff, or of resting and taking whatever vagarious verdict the jury might reach in the evidentiary

vacuum. Defendants, therefore, called ten year old Larry Brox, who testified that he and the decedent had been playing earlier on the morning of the accident in a playground (J.A. 33), but that before the accident they had gone from east to west under the bridge and had come up on top of the bridge from the west side of New Jersey Avenue. (J.A. 37) Just before the accident Larry Brox had hidden behind the concrete wall in the center of the street, (J.A. 34, 35, 39) and he saw the decedent run across the street immediately after saying "Watch me beat this car!" (J.A. 34) He identified a photograph, plaintiff's exhibit No. 5, and testified that the decedent had been behind the wall in that picture just before he started to run and that he ran across the street from left to right on that picture. (J.A. 34) He testified that he did not know where the other children were at the time of the accident (J.A. 37), but stated that he was hiding behind the center wall on the other side of the wall from the truck when the accident happened. (J.A. 39)

Another eye witness to the accident was Charles Kincaid, a post office special delivery messenger. (J.A. 40) He was driving south on New Jersey Avenue and as he approached the north end of the bridge he picked up the movement of a boy running towards the center of the street. (J.A. 41) Just after that he saw the northbound Gulf Oil pickup truck. (J.A. 42) When asked to state his recollection he said: "Well, the boy reached the center of the street and then stepped out, as I recall, and the truck hit him instantaneously as he hit the center of the street." (J.A. 42) Mr. Kincaid stated that he saw no other boys in and about the travelled portion of the roadway at the time of the accident (J.A. 42), and that he remained on the scene long enough to give his name as a witness to the police officer. (J.A. 42)

Defendant Harry R. Block testified that he drove the Gulf Oil Corp. 1957 ½ ton pickup truck at about 25 to

30 miles per hour, north across the train bridge on New Jersey Avenue (J.A. 43), and that as he approached the north end of the bridge he saw no one on or near the travelled portion of the roadway. (J.A. 43) Just as he approached the end of the bridge he saw the boy run out from behind the wall, approximately 2 or 3 feet in front of the truck, at a point in time and distance when he had no opportunity to avoid the accident. (J.A. 43) The other evidence offered by defendant included a stipulation to the effect that the main portion of the center concrete wall was 63 inches high at the north end of the bridge. (J.A. 45) Defendant also introduced two traffic regulations, 52(c) and 53(a). (J.A. 46) Thereafter defendant moved for a directed verdict as to the first count on the grounds that since death was instantaneous, a survival action did not lie. (J.A. 46) Plaintiff's counsel consented to that motion, and it was granted by the court. (J.A. 46) Defendant also moved for a directed verdict on the second count on three grounds. (J.A. 47) First, that no actionable negligence had been established. Second, that contributory negligence had been established as a matter of law. Third, that there was no evidence from which a jury could conclude that the operator's conduct, if negligent, was a proximate cause of the accident. The court again ruled that speed is always a proximate cause of an accident and denied the motion. (J.A. 48)

Thereafter the trial court erroneously denied certain requested instructions (J.A. 50) and accepted others in principle only. (J.A. 50) The charge as given contained many errors which are specified in this brief. (J.A. 57-61) Because of confusion resulting from the charge on the law of contributory negligence, the jury submitted a question to the court which was answered by additional erroneous instructions. (J.A. 64) A verdict in the amount of $20,000 was returned with no allocation as required by statute because the evidence did not even iden-

tify the decedent's next of kin. (J.A. 65) Upon receipt of the verdict, the court, sua sponte, announced that it would entertain an application for remittitur. (J.A. 65) However, when the motion for judgment notwithstanding the verdict, for a new trial, and for reduction of verdict was made (J.A. 75), all relief requested in these alternative motions was denied. (J.A. 72) The trial court dictated its opinion. (J.A. 67-72) This appeal followed. (J.A. 77)

STATUTE INVOLVED

Title 16-1201, District of Columbia Code (1961 Edition) provides in pertinent part as follows:

> Whenever by an injury done or happening within the limits of the District of Columbia the death of a person shall be caused by the wrongful act, neglect, or default, of any person or corporation, . . . the person who or corporation which would have been liable if death had not ensued shall be liable to an action for damages for such death, . . . and such damages shall be assessed with reference to the injury resulting from such act, neglect, or default, causing such death, to the spouse and next of kin of such deceased person; and shall also include the reasonable expenses of last illness and burial: . . . *Provided further*, That if in a particular case the verdict is deemed excessive the trial justice of the United States Court of Appeals for the District of Columbia, on appeal of the cause, may order a reduction of the verdict: . . .

REGULATION INVOLVED

Traffic and Motor Vehicle Regulations for the District of Columbia, Article X, Sec. 54, provides in pertinent part as follows:

> . . . every driver of a vehicle shall exercise due care to avoid colliding with any pedestrian upon any roadway and shall give warning by sounding its horn

when necessary and shall exercise proper precaution upon observing any child or any confused or incapacitated person upon a roadway.

STATEMENT OF POINTS

1. The court erred in denying defendant's motion for directed verdict at the conclusion of plaintiff's case because plaintiff introduced no evidence with respect to the circumstances surrounding the happening of the accident which would satisfy plaintiff's affirmative obligations to show that the negligence alleged was a proximate cause of the accident.

2. The court erred in denying defendant's motion for directed verdict at the conclusion of all the evidence and in denying defendant's motion for judgment notwithstanding the verdict because (a) at the conclusion of the case there was still no evidence which would satisfy plaintiff's affirmative obligation to prove that the negligence alleged was a proximate cause of the accident; (b) plaintiff's decedent was guilty of contributory negligence as a matter of law; (c) there was no evidence which would identify decedent's next of kin or establish any damages sustained by them.

3. The trial court erred in denying defendant's motion for new trial because it erred in the admission of traffic regulation 54 which had no basis in the evidence, because it erred in excluding the testimony of the police officer concerning the spontaneous statements of the minor witnesses on the scene of the accident, and because it erred in its instructions to the jury on: (a) proximate cause; (b) contributory negligence; (c) prohibition against speculation; (d) violation of a traffic regulation as negligence per se; (e) the effect of uncontradicted evidence; and (f) damages.

4. The court erred in permitting arguments based upon contentions not in the case and factual assertions not supported by the evidence.

5. The court erred in holding that excessive speed is always a proximate cause of an accident.

6. The court erred in holding that a 7½ year old boy is not capable of contributory negligence as a matter of law.

7. The court erred in refusing to reduce the verdict pursuant to the authority granted by Title 16-1201, District of Columbia Code (1961 Edition).

SUMMARY OF ARGUMENT

The verdict and judgment questioined on this appeal were the result of multiple errors and misconceptions on the part of the trial court after it was confronted with a claim of liability and damages which plaintiff was unwilling or unable to support with evidence. It is fundamental that the defendant should not have to bear the burden of proving that the claims alleged are not justified; and yet, at the instant trial, plaintiff rested his case after proving only that the seven and one-half year old son of the plaintiff-administrator was struck and killed by a truck travelling at the approximate speed of thirty-five miles per hour. There was no attempt made to prove proximate cause or damages.

The issues, aside from those arising from specific evidentiary rulings and elements of the court's charge, are: (1) whether a verdict can be permitted to stand without evidence that the alleged negligence was a substantial factor in causing the accident; and (2) whether a substantial verdict can be permitted to stand without any evidence on the issue of damages. On both issues appellant is entitled to prevail.

For lack of evidence of proximate cause, the trial court should have directed a verdict in appellant's favor. Because contributory negligence was clear the trial court should have directed a verdict in appellant's favor. Alternatively, the trial court should have granted a new trial because of errors in its charge on the issues of: (1) proximate cause; (2) contributory negligence; (3) prohibition against speculation; (4) negligence per se; (5) the effect of uncontradicted evidence; and (6) damages. The trial court should also have granted the motion for new trial because of its errors in the admission of traffic regulation, Section 54, and the exclusion of the police officer's testimony concerning the spontaneous declarations of the witnesses Larry Brox and Nathan Wood. Finally, the trial court should have granted appellant's motion for a reduction in the amount of the verdict, pursuant to the authority of Title 16-1201, District of Columbia Code (1961 Edition), because it was clearly unsupported by the evidence and was excessive under the circumstances of this case.

ARGUMENT

A. There Was No Evidence Which Would Support a Finding That Excessive Speed Was a Proximate Cause of the Accident.

1. *The trial court erred in ruling that excessive speed is always a proximate cause of an accident.*

There are many substantial questions raised on this appeal which arise from the successful attempt by plaintiff to obtain a judgment against defendant without producing evidence in support of his claims. Plaintiff's counsel made two basic contentions with respect to liability. He stated in his opening remarks to the jury that he would show by competent evidence that there were five children around the bridge whom the defendant driver could have seen easily, if he had been keeping a proper

lookout[2] (J.A. 13), and he contended that the defendant driver was negligent in that he exceeded the speed limit. (J.A. 11) He also mentioned the doctrine of last clear chance but was not permitted to dwell on that subject in his opening statement. (J.A. 12) Plaintiff called only one witness on liability issues, and that was Officer Bramhall, who arrived on the scene of the accident thirteen minutes after it occurred. (J.A. 14, 26) He described the physical layout (J.A. 16-30), established the point of impact (J.A. 28), identified a dent and certain blood spots (J.A. 15, 16, 18), and located 93½ feet of overall skid marks, which he observed when he arrived at the scene of the accident. (J.A. 15, 39) Officer Bramhall took certain photographs (J.A. 27) and interrogated the witnesses, however, he was not permitted to testify to what they said. (J.A. 26) The only other testimony he gave was to state his opinion that from the length of the skid marks the speed of defendant's north bound truck had been thirty-five miles per hour in the twenty-five mile per hour zone. (J.A. 18) He said the point of impact was "right at the end of the center wall on the north end of the bridge." (J.A. 28) The dent indicated that the pedestrian had been struck by the left front headlight, and the blood spots indicated that the pedestrian was carried approximately eighty-eight feet north from the point of impact. (J.A. 16, 28) At that stage of the proceedings, there was no testimony concerning the manner in which the accident had occurred, or even that the plaintiff's decedent was the boy struck by this particular truck. There was no testimony as to how a pedestrian happened to be in the roadway, or as to what he may have done to cause the accident. In short, there was no testimony or evidence of any kind, except that an accident had occurred at a particular spot which involved a truck going approximately thirty-five miles

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[2] The trial court later declined to submit this issue to the jury. (J.A. 50-51)

per hour. Defendant moved for a directed verdict on the ground that no actionable negligence had been shown in that there was no evidence of the circumstances of the accident, and no evidence on the issue of proximate cause. (J.A. 32) The motion was denied upon the basis of the trial court's previously announced conviction that speed is always a proximate cause. (J.A. 13, 21, 33)

Proximate cause is one of those concepts which, although very often taken for granted, is nevertheless the subject of considerable judicial interpretation. For the District of Columbia this Court has adopted the *substantial factor* test of proximate cause. Before a negligent act can be found to be a proximate cause of an accident, it must be shown that it was a substantial factor; or to phrase it another way, it must be shown that the acciden would not have occurred *but for* the allegedly negligent act. *Hitaffer* v. *Argonne Co.*, 87 U.S. App. D.C. 57, 183 F.2d 811, *cert. denied*, 340 U.S. 852 (1950); *Howard* v. *Swagart*, 82 U.S. App. D.C. 147, 161 F.2d 651 (1947); *S. S. Kresge Co.* v. *Kenney*, 66 App. D.C. 274, 86 F.2d 651 (1936). As stated by Prosser:

> 'Substantial factor' is a phrase sufficiently intelligible to the layman to furnish an adequate guide in instruction to the jury, and it is neither possible nor desirable to reduce it to lower terms. As applied to the fact of causation alone, no better test has been devised. (Prosser, *Torts* § 44, at p. 221 (2d ed. 1955))

There are two propositions which are established in the authorities beyond question. The first is that speed is not always a proximate cause, and the second is that there must be evidence in the record which demonstrates that the negligence charged was a proximate cause of the accident.

In *Huber* v. *Anderson*, 355 Pa. 247, 49 A.2d 628 (1946), a judgment for defendant notwithstanding verdict for plaintiff was affirmed where a child coasted down a

hill and collided with the left wheel of defendant's automobile. There was evidence that the automobile was travelling at an excessive rate of speed. The court stated at page 630:

> In any case the question of speed is immaterial . . . . 'We may speculate that had the automobile been going faster or slower, the sled might have missed it, but the accident was not the normal result of the speed of the vehicle.'

In *Mowrey* v. *Schulz*, 230 Iowa 102, 296 N.W. 822 (1941), where a 9 year old boy rode his bicycle out of an alleyway in front of defendant's automobile and the evidence was that the automobile was going thirty-five miles per hour in a twenty-five mile per hour zone, the court stated at page 824:

> Assuming that the automobile was travelling at a negligent speed, such negligence was not a proximate cause of the accident. Had the car been travelling at any other rate of speed the accident would have happened if the boy had ridden into its lane of travel as it reached that place. The proximate cause of the accident was the wrongful act of Russell [the boy] in riding from the entrance of the alley without stopping and continuing into the lane of travel, where he had no legal right to be. The boy was first observable by Schulz [the driver] as he passed the parked cars, which had concealed it from view. It appeared suddenly only several feet distant from and travelling north toward the automobile. It was then so near an accident was inevitable and would likewise have happened had the automobile been travelling slower. The record fails to show any causal connection between the speed of the automobile and the accident. [Citations omitted.]

In *Crutchley* v. *Bruce*, 214 Iowa 731, 240 N.W. 238 (1932), an 8 year old boy jumped in front of defendant's automobile just as it passed a standing truck and was killed instantly. There was evidence that defendant was going approximately fifty miles per hour in a forty mile

per hour zone. The court reversed the trial court's refusal to grant defendant's motion for directed verdict and stated at page 239:

> The important question at this point is whether or not the speed of appellant's car was the proximate cause of the injury to appellee's intestate.
>
> Even though the driver of an automobile may violate the law in some particular, still this cannot be made the basis of recovery by an injured party, unless the illegal act was in some way the proximate cause of the injury . . . . In the instant case, the accident would have happened just as readily had appellant been driving his car at a much less rate of speed and within the statutory limit. It was not the speed of appellant's car that was the proximate cause of injury to the boy.

In *Underwood* v. *Fultz*, 331 P.2d 375 (Okla. 1958), a 19 month old boy was killed instantly when he darted across the street in front of defendant's automobile which was being driven in a residential section at thirty to thirty-five miles per hour, an allegedly excessive rate of speed. At page 378 the court stated:

> If, as a matter of law, there was no causal connection between the speed of defendant's car and the accident, then the trial court properly refused to submit the question of excessive speed to the jury.
>
> In the instant case the evidence shows that the defendant was paying attention and yet did not and could not see the child until the instant of impact. Her speed would have been a causal connection if a slower speed might have enabled her to avoid striking the child, but under the evidence in this case defendant never had an opportunity to attempt avoiding the child and the same would have been true had she been driving at a slower speed at the moment she first became aware of the boy in the road.

See also *Fisher* v. *Deaton*, 196 N.C. 461, 146 S.E. 66 (1929).

In the instant case the only evidence advanced at the trial which related to the circumstances of the accident was that introduced by defendants. This evidence was to the effect that the impact occurred right at the end of the center wall at the north end of the bridge (J.A. 28) almost instantaneously (J.A. 42, 43) as the decedent ran from behind that wall when the truck was two or three feet away. (J.A. 42, 43) The photographs in evidence will indicate that the truck was being driven approximately in the center of the north bound lane (Exhibit No. 11) and that the wall which had hidden the boy was to the defendant driver's left. (Exhibit No. 5) The photographs will also demonstrate that the point of impact on the truck was at the left front headlight. (Exhibit No. 14) There was no evidence which would establish the basis for a reasonable conclusion that the accident would not have happened if the truck had been going at a greatly reduced speed. The only logical inference was that if the truck's speed had been slower, the plaintiff's decedent might have gotten further across in front of the truck, but there was no rational basis in the evidence for concluding that the accident would not have occurred.

2. ***The trial court erred in failing to direct a verdict when plaintiff failed to sustain his evidentiary burden to show proximate cause.***

The plaintiff had the burden to prove the essential elements of the cause of action by a preponderance of the evidence. At the conclusion of plaintiff's case there was no evidence at all upon the element of proximate cause and the trial court, therefore, erred in failing to direct a verdict at that time. At the conclusion of all of the evidence, even though the defendant introduced evidence showing the circumstances of the collision, there was still no basis for a conclusion that the speed of the vehicle was a substantial factor in causing the accident.

In *Sherman* v. *Lawless*, 298 F.2d 899 (8th Cir. 1962), a judgment in favor of plaintiff in a wrongful death action was reversed. At page 901 the court said:

> The burden is upon plaintiff to prove the essential elements of her cause of action by a preponderance of the evidence. In addition to proving negligence, the plaintiff must prove 'that such negligence was a proximate cause of the accident, and that damages were caused as a result, together with the extent thereof' . . . .

and at page 902:

> However, the evidence must be such as to make the plaintiff's theory of causation reasonably probable, not merely possible. [Citation omitted.] If the proven facts go no further than to give equal support to two inconsistent inferences, the judgment must go against the party upon whom rests the burden of proof.

In *Atchison, T. & S.F. Ry.* v. *Hamilton Bros.*, 192 F.2d 817 (8th Cir. 1951), the court quoting from a state decision, at pages 821-22 stated:

> The rule is elemental that the burden remains with plaintiff to the end of the case to establish by proof, not only the fact of the negligence averred, but also to show a direct connection between such negligence and the injury. Where the ultimate fact is not susceptible of direct proof, its existence must directly follow as a reasonable conclusion from its basic facts and circumstances, and it may be stated as an axiomatic rule that whenever court or jury are left by the evidence in a situation where, in order to find the ultimate fact alleged, they must piece out the facts adduced with conjecture or supposition, the plaintiff must be held to have failed in his proof.

See, *e.g.*, *Richardson* v. *Gregory*, 108 U.S. App. D.C. 263, 281 F.2d 626 (1960); *MacLachlan* v. *Perry*, 63 App. D.C. 24, 68 F.2d 769 (1934); *Collins* v. *District of Columbia*, 60 App. D.C. 100, 48 F.2d 1012 (1931); *Jellison* v. *Kroger Co.*, 290 F.2d 183, 185 (6th Cir. 1961); *Rexall Drug Co.*

v. *Nihill*, 276 F.2d 637 (9th Cir. 1960); *Ford Motor Co.* v. *Mondragon*, 271 F.2d 342 (8th Cir. 1959); *McClendon* v. *T. L. James & Co.*, 231 F.2d 802 (5th Cir. 1956); *Miller* v. *Dixie Greyhound Lines, Inc.*, 164 F.2d 977 (5th Cir. 1947); *Altrichter* v. *Shell Oil Co.*, 161 F. Supp. 46 (D. Minn. 1958).

3. The trial court erred in its instructions to the jury on the issue of proximate cause.

Despite the authorities which clearly require an evidentiary basis for a finding on proximate cause, the trial court from the very beginning of the proceedings erroneously took the view that proximate cause was to be taken for granted in any case of speed limit violation.[3] However, the error of the court in failing to rule for defendant as a matter of law, was compounded because after giving the traditional proximate cause instruction, the trial court said:

> If the truck was considerably in excess of the speed limit, that in itself may be considered by you, ladies and gentlemen of the jury, as evidence of negligence under our law and you may find on that basis that the truck driver was guilty of negligence; and if you so find, then, of course you have to take another step. Was the excessive speed *one of the causes of the accident?* Of course, if the truck had been going at a slower rate of speed, perhaps the boy might have been able to run to safety, or perhaps if the boy had been struck the impact would not have been as severe and might not have caused the boy's death. All of these matters are for you to consider, not for me. I am just calling them to your attention. What weight you should give to them, if any is for you to determine. (J.A. 58) (Emphasis supplied.)

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[3] The transcript of proceedings does not include all of the pretrial colloquy, however, it contains enough to demonstrate that the trial court decided that excessive speed, if proven, was a proximate cause of the accident in this case even before he heard any of the evidence concerning the circumstances. (J.A. 12-13)

First, it was error to tell the jury that they should ask themselves the question: "Was the excessive speed one of the causes of the accident?" (J.A. 58) The court in those comments negated previously charged proximate cause considerations and told the jury that they were merely to ask themselves whether speed was one of the causes of the accident, regardless of whether it was a proximate cause. Secondly, this portion of the charge is erroneous because there was no evidence from which the jury could rationally have concluded that the boy might have been able to run to safety had the truck being going at a legal rate of speed. (J.A. 13-46) To postulate such an extreme possibility to the jury under the cloak of the trial court's right to comment on the evidence was grossly prejudicial error. Similarly, when the trial judge suggested to the jury that "perhaps . . . the impact would not have been as severe. . . ." (J.A. 58), he was encouraging the jury to speculate because there was no evidence introduced of a medical nature or otherwise to the effect that the injuries were more severe than those that would have resulted from an impact at a lesser speed; moreover, there was no evidence which would support a conclusion that the death would not have been caused if the truck had been travelling at a legal rate of speed. The instruction was also erroneous because proximate cause is a liability concept, not a damage concept, and the mere fact that injuries might be more severe in one accident than in another, does not create a liability situation where one would otherwise not exist. The tort is established by evidence when there is adequate testimony to show negligence which proximately causes an accident resulting in some injury. If no liability would exist for an accident which resulted in bruises or a broken arm, there is no liability for the same accident merely because the injuries are more severe and result in death.

B. Contributory Negligence

1. *The issue of capability was an issue of law improperly decided by the trial court.*

The law in the District of Columbia is clear that a child of seven can be guilty of contributory negligence. There may be a tender age, such as two or three, at which a child may not be guilty of contributory negligence as a matter of law. The issue in this case properly concerns the standard to be applied—not a determination of whether to apply the standard. The authorities in this jurisdiction hold that the age, education, capacity, knowledge, experience and degree of intelligence of the particular child must be considered and his conduct judged by a comparison of what should be expected of a similarly gifted child in similar circumstances. Of course, less discretion is expected than is required of an adult. *D. C. Transit Sys., Inc.* v. *Bates*, 104 U.S. App. D.C. 386, 262 F.2d 697 (1958); *United States* v. *Benson*, 88 U.S. App. D.C. 45, 185 F.2d 995 (1950); *Capital Transit Co.* v. *Gamble*, 82 U.S. App. D.C. 57, 160 F.2d 283 (1947); *Barstow* v. *Capital Traction Co.*, 29 App. D.C. 362 (1907); *Baltimore & P. R. R.* v. *Cumberland*, 12 App. D.C. 598 (1898), *aff'd.*, 176 U.S. 232 (1900).

The trial court submitted the issue of decedent's contributory negligence to the jury; however, its charge was flavored by the personal view expressed by the court that the decedent could not be guilty of contributory negligence as a matter of law. (J.A. 68) This conviction was erroneous. The facts presented at trial show that the decedent was seven and one-half years old (J.A. 14), about to enter the third grade (J.A. 15), permitted to play with other children in the streets of the District of Columbia (J.A. 34), bright and alert for his age (J.A. 15), and sufficiently aware of the circumstances so that he willingly engaged in a race, for his last words were "Watch me beat this car!" (J.A. 34)

His companion testified that he hid behind the solid concrete wall in the center of the road. (J.A. 34) The action of decedent in running from behind a wall directly into the path of an oncoming vehicle (J.A. 42, 43) with the intention of attempting to beat it (J.A. 34, 35) was rash and reckless conduct which constituted contributory negligence as a matter of law because it violated all standards of due care imposed by law, even those applicable to seven and one-half year olds.

If the trial court felt that it was without the power to declare such conduct to be contributory negligence as a matter of law, it was mistaken. The applicable rule of law is that:

> If a child of sufficient age to comprehend the danger recklessly leaves a place of safety and runs into the path of a motorist without such regard for the hazards of his action as may reasonably be looked for in one of his age and capacity, he is chargeable with contributory negligence. (7 Am. Jur. 2d, Automobile and Highway Traffic, § 450, at p. 1002 (1963)).

This court recognized in *Baltimore & P. R. R.* v. *Cumberland, supra* at page 606, and *Barstow* v. *Capital Traction Co., supra* at page 378, that the conduct of children may be held to constitute contributory negligence as a matter of law. The law in other jurisdictions is generally to the same effect. For example in *Union Carbide & Carbon Corp.* v. *Peters*, 206 F.2d 366 (4th Cir. 1953), the court said at page 371-372:

> We think that the record clearly reveals that the infant plaintiff was guilty of contributory negligence. . . . The fact that he momentarily forgot the danger which existed does not excuse him from the results of his own act. True as it is that the duty to remember imposes a lighter burden upon an infant than upon an adult, we think that the thoughtlessness of the infant plaintiff in the circumstances of this case, bars his recovery, and that of his father.

See, *e.g.*, *Denman* v. *Youngblood*, 337 Mich. 383, 60 N.W. 2d 170 (1953), (8 year old girl held contributorily negligent as a matter of law for not heeding an automobile which she saw before attempting to cross a street); *Conrad* v. *Krause*, 325 Mich. 175, 37 N.W.2d 906 (1949), (8 year old in third grade struck by truck while crossing highway); *Ackerman* v. *Advance Petroleum Transp., Inc.*, 304 Mich. 96, 7 N.W.2d 235 (1942), (8 year old boy in third grade killed when he ran into truck); *Moran* v. *Smith*, 114 Me. 55, 95 Atl. 272 (1915), (8 year old boy who ran in front of automobile); *Adams* v. *Boston Elev. R. Co.*, 222 Mass. 350, 110 N.E. 965 (1916), (6½ year old child crossing streetcar tracks). See also: *Sperry* v. *Wabash R. Co.*, 55 F. Supp. 825 (D. Ill. 1944); *Laidlaw* v. *Barker*, 78 Idaho 67, 297 P.2d 287 (1956); *Brophy* v. *Milwaukee Elec. R. & Transport Co.*, 30 N.W.2d 76 (Wisc. 1947); *Duval* v. *Palmer*, 113 Vt. 389, 34 A.2d 317 (1943); *Brinker* v. *Tobin*, 278 Mich. 42, 270 N.W. 209 (1936) (7 year old child crossing highway); *Moore* v. *Cook*, 275 Mich. 578, 267 N.W. 567 (1936); *Franks* v. *Woodward*, 258 Mich. 447, 243 N.W. 20 (1932); *Godfrey* v. *Boston Elev. R. Co.*, 215 Mass. 432, 102 N.E. 652 (1913) (6 year old crossing street car track); *Mollica* v. *Michigan Cent. R. Co.*, 170 Mich. 96, 135 N.W. 927 (1912); and *Hayes* v. *Norcross*, 162 Mass. 546, 39 N.E. 282 (1895).

2. Assuming that contributory negligence was properly submitted to the jury, the trial court's instructions on that issue were erroneous.

The trial court preliminarily defined contributory negligence in correct terms and properly advised the jury as to its effect in the case of an adult. But the court immediately thereafter told the jury that "the rule in regard to an infant of tender years, however, is *entirely* different." (Emphasis supplied.) (J.A. 59) The court, therefore, prescinded from the correct rule of law it had

just stated. The court then proceeded to submit the following question of law to the jury disguised as a question of fact: "Whether an infant is capable of being guilty of contributory negligence under the facts of any case is a question of fact for you ladies and gentlement to determine." (J.A. 60) The law is clear that a seven and one-half year old child is capable of being guilty of contributory negligence; consequently, it was improper to submit the issue of capability to the jury. The proper issue for jury determination was whether, under the legal standards imposed upon the particular seven and one-half year old involved, there was contributory negligence as a matter of fact. The trial court, upon objection, refused to modify the instruction. (J.A. 63) The confusion in the minds of the jurors is evident from the fact that after a few minutes deliberation [4] they sent a note to the court which read: "Please let us see the part of law dealing with the judgment of a child contributing to negligence." (J.A. 63-64) Upon receiving this request the court did not inquire of counsel with respect to their views as to re-instruction. It merely advised the jury improperly that "you have to have a different standard of what constitutes due care for a child and what constitutes due care for an adult and *what the standards should be is your own judgment.*" (Emphasis added.) (J.A. 64) This part of the court's charge was grossly improper because the jury is never entitled to substitute their own judgment for properly defined legal standards. The trial court further compounded the error in the next paragraph of his charge, when he told the jury that the material question was whether or not the decedent did something a seven year old child would not be expected to do. (J.A. 64) The standard of contributory negligence established by the authorities in this and in other jurisdictions relates not to what a seven year old child would do, but to what a seven

[4] The jury retired at 12:02; went to lunch at 12:30; returned at approximately 1:45; and submitted their question at 1:55 (J.A. 63).

year old child of the decedent's intelligence, knowledge, capability, training and maturity would do. The entire charge on contributory negligence, therefore, failed to comply with minimal standards and the verdict and judgment based thereon should be reversed.

If this court is not of the opinion that contributory negligence as a matter of law was established by the evidence so that defendant is entitled to remand with instruction to enter judgment for defendant, it is clear that as minimal relief defendant is entitled to remand with instruction to grant a new trial on proper instructions with reference to the defense of contributory negligence.

C. The Trial Court's Charge Contained Multiple and Fundamental Error.

Appellant was faced during the course of this trial with the constant refusal of the trial court to recognize that the plaintiff had the burden of proof with respect to negligence and damages. It was apparent that the trial court would not make any rulings in appellant's favor as a matter of law. For this reason particularly, the trial court was charged with the duty of making sure that the contested issues which he submitted for jury determination were submitted fairly and upon proper instructions of law. The court failed in this duty for the charge contains fundamental error.

The trial court denied defendant's requested instruction No. 1 as written (J.A. 50, 73) and in its place gave the court's own instruction on contributory negligence, the improprieties of which have been discussed previously in Section B(2) of this argument. The trial court improperly instructed on the issue of proximate cause by telling the jury in one portion of its charge that they were only required to find that speed was "one of the causes of the accident." (J.A. 58) This error has also been discussed previously in Section A(3). The trial

court erred in denying defendant's requested instruction No. 3 (J.A. 50, 74) which is a clear and valid statement of the law against speculation by a jury. The omission of this instruction was extremely important in this case which, as has been demonstrated, was based entirely upon plaintiff's conjecture and speculation. The trial court erred in denying defendant's requested instruction No. 6 (J.A. 52, 74) that there is a legal presumption that reasonable care was exercised by both parties. *F. W. Woolworth Co.* v. *Williams*, 59 App. D.C. 347, 41 F.2d 970 (1930); *Martin* v. *United States*, 96 U.S. App. D.C. 295, 225 F.2d 945 (1955). The failure to so charge destroyed the effectiveness of the burden of proof instruction because it is clear that the defendant is entitled to a presumption of reasonable care until the plaintiff has fulfilled his burden of proof to establish negligence. The trial court erred in denying defendant's requested instruction No. 7 (J.A. 53, 75) which was to the effect that the defendant driver had the right to assume, in the absence of facts or notice to the contrary, that others using the roadway would perform their duty under the law. This failure to grant request number 7 was especially significant because, although the court admitted traffic regulations 52(c) and 53(a) which prohibited pedestrians crossing at the place of the accident (J.A. 46), it permitted plaintiff's counsel, over defendant's objection, to argue that the defendant's driver should have assumed children would be crossing there. (J.A. 51-56)

The trial court erred in refusing to restrict plaintiff's counsel to the evidence in final argument to the jury (J.A. 51-56) because as the court stated: "The only negligence charged against the defendant is exceeding the speed limit." Yet, the court refused to preclude argument to the effect that the defendant failed to keep a proper lookout and should have seen that which was there to be seen, when there was no evidence to support such

an argument. (J.A. 51-56) The trial court erred in advising the jury that they were entitled to award damages to the "little boy's estate." (J.A. 57) Actually the court re-instructed when that error was called to its attention (J.A. 63); however, after correcting the error of law it told the jury "I don't think that changes anything else that I have said or affects your work at all." (J.A. 63) The trial court erred in advising the jury that it was free to reject uncontradicted evidence (J.A. 48, 60) to the effect that the boy ran out in front of the truck and that the accident happened instantaneously. The trial court erred in advising the jury during the course of defendant's final argument that violation of the speed regulation constituted negligence as a matter of law (J.A. 66)[5] The trial court erred in its instruc-

[5] There was apparently no consistency in the trial court's approach to the defense in this case. Time and time again the court ruled that violation of the speed regulation was not negligence per se, but only evidence of negligence which could be considered (J.A. 21, 33, 49, 58), and yet when defense counsel attempted to argue to the jury that the violation was not necessarily negligence in this case, the court, sua sponte, stopped the argument and said: "Mr. Arness, I am not going to permit you to argue that it is permissible under certain circumstances to exceed the speed limit. . . . I will instruct the jury to the contrary . . . . But the regulation as to reasonable speed merely means that there are occasions when going at the maximum speed limit may be unreasonable. It does not apply the other way, that you may exceed the speed limit when you think it is reasonable to do so." (J.A. 66)

For a very good reason this Court has held on many occasions that a violation of traffic regulations is not negligence per se. It would not be proper to deprive a plaintiff motorist of a recovery when struck by a negligently operated truck merely because plaintiff was exceeding the speed limit. It is better to let the regulation in as evidence of the average standard and let the jury determine whether the violation is negligence in the light of the circumstances presented. *Peigh* v. *Baltimore & O.R. Co.*, 92 U.S. App. D.C. 198, 204 F.2d 391 (1953); *Richardson* v. *Gregory*, 108 U.S. App. D.C. 263, 281 F.2d 626 (1960); *Karlow* v. *Fitzgerald*, 110 U.S. App. D.C. 9, 288 F.2d 411 (1961). What is the law for plaintiffs, must also be the law for defendants. The trial court in this case recognized the law (J.A. 21), but refused to apply it and let the matter run its course. For that reason alone the judgment should be reversed.

tion to the jury on the issues of damages by submitting in a speculative and conjectural fashion items for which there was no support in the evidence. (J.A. 60-61)

D. The Spontaneous Statements of the Minor Witnesses Made Within a Few Minutes After the Accident To the Police Officer Should Have Been Admitted.

There were two adult eye witnesses to the accident. Both testified in substantial accord that the accident occurred almost instantaneously when the plaintiff's decedent ran from behind the concrete divider directly into the path of the truck. (J.A. 42-43) There was another source, however, from which trustworthy evidence concerning the exact circumstances of the collision could have been obtained; that was from Officer Bramhall, who, as the first investigating police officer on the scene, heard and recorded the spontaneous exclamations of Larry Brox and Nathan Wood, who had been the decedent's companions. At the time of the accident Larry Brox was seven and Nathan Wood was nine. Both testified at the coroner's inquest on September 6, 1960, as did Officer Bramhall;[6] obviously, however, their recollections had dimmed in the two and one-half years that elapsed prior to trial, and the only precise recordation of their recollection was in the notes of Officer Bramhall. He was in a position to testify as to the statements of each of the children concerning his location when the accident occurred, what each had been doing just prior to the accident, and exactly what the decedent had said before he started to run across in front of the truck. Officer Bramhall would have testified that while the decedent's companions hid behind the wall, the decedent, after stopping

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[6] This transcript of the coroner's inquest "In the matter of DWIGHT REED, Deceased. Case No. 26-225, September 6, 1960" was not introduced in evidence, however, it was available to all counsel and as a matter of fact shows the participation of Franklyn Yasmer, Esquire, as attorney for the family of the deceased.

in the south bound lane on the side of the wall away from the truck, suddenly yelled to his companions "Watch me beat this * * * truck" [Profanity omitted] and thereupon darted from behind the middle divider across the north bound lane. When defendant attempted to elicit from the police officer what Larry Brox and Nathan Wood had told him, the court sustained the hearsay objection of plaintiff's counsel and refused to permit defense counsel to approach the bench so that a proffer could be made. (J.A. 25) The trial court did permit counsel for defendant to establish that the police officer arrived on the scene and talked to the boys approximately thirteen minutes after the accident when there was still a milling around and when the excitement from the accident hung in the air. (J.A. 25-26) The officer also testified that he talked to the boys before anyone else had had an opportunity to do so (J.A. 26), and before they had had any opportunity for reflection. (J.A. 26) The trial court then ruled as a matter of law that solely because the boys' statements were made in response to inquiries from the police officer they were not spontaneous exclamations and hence were inadmissible. (J.A. 26)

The test for receiving Officer Bramhall's testimony concerning statements of the two minor witnesses was not whether such statements were elicited during the course of formal investigation. The test for receiving statements as excited utterances or spontaneous declarations in exception to the hearsay rule is whether there was (a) an exciting event, and (b) an utterance prompted by the exciting event without time to reflect. *Murphy Auto Parts Co.* v. *Ball*, 101 U.S. App. D.C. 416, 249 F.2d 508 (1957), *cert. denied*, 355 U.S. 932 (1958). This exception rests upon the sound principle that:

> '[S]ince [the] utterance is made under the immediate and uncontrolled domination of the senses, and during the brief period when considerations of self-interest could not have been brought fully to

> bear by reasoned reflection, the utterance may be taken as particularly trustworthy. . . .' (*Wheeler* v. *United States*, 93 U.S. App. D.C. 159, 164-65, 211 F.2d 19, 24 (1953), *cert. denied*, 347 U.S. 1019 (1954), quoting from 6 Wigmore, § 1747.)

The excited utterance most often is a description of an accident by a participant or by a witness in which he asserts the circumstances observed by him. The fact that the statement is made in response to a question is not determinative of spontaneity, but is merely a fact entitled to consideration. See, *e.g.*, *Wabisky* v. *D. C. Transit Sys., Inc.*, —— U.S. App. D.C. ——, 309 F.2d 317 (1962); *Guthrie* v. *United States*, 92 U.S. App. D.C. 361, 364, 207 F.2d 19, 22 (1953); *Beausoliel* v. *United States*, 71 App. D.C. 111, 114, 107 F.2d 292, 295 (1939).

In this particular case there are several compelling reasons why the testimony should have been admitted. First, neither Larry Brox nor Nathan Wood had any self-interest which would have detracted from the trustworthiness of their statements. Second, the courts in the District of Columbia have long held that when the utterance is made by an infant the law should favor admissibility and should require less rigid proof of spontaneity. In *Beausoliel* v. *United States*, *supra*, the court considered a mother's testimony concerning what her six year old child had related of an assault which had occurred earlier in the day, and properly admitted the testimony as a spontaneous utterance, stating at pages 114, 295:

> It has been held, moreover, that where, as in the present case, the victim is of such an age as to render it improbable that her utterance was deliberate and its effect premeditated, the utterance need not be so nearly contemporaneous with the principal transaction 'as in the case of an older person, whose reflective powers are not presumed to be so easily affected or kept in abeyance.'

Similarly in *Wheeler* v. *United States*, *supra*, the court sustained the admission of statements of a ten year old

made approximately one hour after the event, stating at pages 164, 24:

> It is clear enough from the circumstances of time in relation to the alleged offense, and the age and condition of the declarant that there is ample basis for holding the declaration to be 'spontaneous' and admissible in evidence. . . .

In *Washington & G.R.R.* v. *McLane*, 11 App. D.C. 220 (1897), the court admitted testimony by witnesses of the statements of a fourteen year old youth, stating at 222 that:

> [T]he tendency of recent decisions is to extend and liberalize the principle of admission . . . [of] declarations and statements . . . that would formerly have been excluded.

and further at page 223:

> The age and suffering of the boy, and all the surrounding circumstances, utterly exclude all idea of calculation or ability to manufacture evidence for ulterior purposes.

See generally Annot., 83 A.L.R.2d 1368, at §§ 7-13 (1962).

During the trial, the court remarked on several occasions how impressed it was with the accuracy and integrity of Officer Bramhall. (Tr. 47-48 J.A. 67) This was an additional reason for admitting the testimony, which complied in every way with the tests laid down by this Court in *Murphy Auto Parts Co.* v. *Ball*, *supra;* and *Wabisky* v. *D. C. Transit Sys., Inc.*, *supra.*

E. The Trial Court Erred In Its Admission of Traffic Regulation 54 and In Its Refusal To Restrict Plaintiff's Argument To the Evidence.

One of the devices used by plaintiff to obtain a verdict which had no evidentiary support was a calculated effort to inject last clear chance considerations into a case

where such doctrine has no application. The trial court was apprised of the fact that plaintiff might attempt to raise such an issue in the case when he inquired with respect to plaintiff's position before the trial actually commenced. (J.A. 12) Plaintiff's counsel advised the court that he expected to be able to prove that the defendant driver could have seen the child when he was 150 to 175 feet away. (J.A. 12) The court was advised at that time that no such evidence existed (J.A. 12), and, in fact, no such evidence was subsequently offered. Plaintiff's counsel, however, in opening statement, told the jury that the evidence would convince them that five children were around that bridge and could have been seen by the defendant driver; then counsel charged the driver with negligence in not having seen the boy until he was a couple of feet away. (J.A. 13) Having made these representations to the trial court and to the jury, plaintiff's counsel was bound in good conscience to introduce such evidence. However, as early as September 6, 1960, when the official coroner's inquiry was held, and the defendant driver exonerated, plaintiff's counsel made the same attempts to cloud the issues and he well knew that all of the witnesses believed that no child was in a position to have been seen before the plaintiff's decedent dashed directly into the path of the truck.

In furtherance of the strategy to advance this theory of liability without evidence, plaintiff's counsel offered Section 54, of the Traffic and Motor Vehicle Regulations for the District of Columbia, which in essence requires a driver to exercise special precautions upon observing any child or any confused or incapacitated person on the roadway. (J.A. 31-32) When offered there was absolutely no testimony which would make that regulation applicable to the case, however, despite defendant's objection (J.A. 31), the trial court admitted it into evidence (J.A. 31-32) and by so doing, gave judicial support to plaintiff's attempt to establish a theory of liability which was

not factually available. The trial court knew that there was no evidence to support the application of that regulation and as a matter of fact even after all of the evidence was introduced, the trial court ruled that there was no such evidence and denied plaintiff's requested instruction No. 5, stating that "Now, No. 5, of course, is good law, but I don't see any basis for it here. I think No. 5 would apply if there was evidence that the driver saw children around. There is no evidence to that effect." (J.A. 49)

The denial of this instruction, however, did not cure the error in previously admitting Section 54. The only way the court could have cured that error was to instruct the jury that there was no evidence introduced which would provide the basis for a finding that the children could have been seen, and, consequently, that Section 54 could not be relied upon to support a claim of negligence. The court should also have instructed plaintiff's counsel not to argue to the jury that the driver was negligent in failing to see the children in time to avoid the accident. The court denied defendant's request that plaintiff's argument be so limited. (J.A. 51-56) In that connection the court ruled that merely because there was not enough evidence to submit the issue to the jury, plaintiff's counsel could not be prevented from arguing the point to the jury in his closing statement. (J.A. 51-52) The trial court did remark to counsel out of the presence of the jury: "Now, if we had the driver's testimony and if we had some other witness who testified that the boy was 30 feet in front of the truck, I would instruct the jury on the last clear chance, but you have not got any such thing." (J.A. 53-54) "Now, if there was evidence that there was an interval between the time that the boy started to run across the road and the impact, obviously, the doctrine of last clear chance would come into play. You offered no evidence—and I appreciate the limitations you are suffering under; that is true in so many death cases—

you offered no evidence to justify an inference that at the last minute the driver might have avoided the accident." (J.A. 53) With full awareness of this evidentiary posture, the trial court committed prejudicial error in permitting plaintiff's counsel to argue to the jury that they should impose liability because if the driver had been paying attention, he should have seen the children in the roadway in front of him and should have done something at the last minute to avoid the accident. (J.A. 51-56)

F. In An Action Under Title 16-1201, Plaintiff Has the Burden of Establishing An Evidentiary Record of Facts and Circumstances Concerning the Deceased, and His Relationship With His Parents, or Next of Kin, Which Will Enable the Jury to Apply the Pecuniary Loss Standard.

Consistent with his attempts to impose liability without demonstrating an evidentiary foundation, plaintiff disdained his obligation to produce evidence in support of the claim for damages. This appeal, therefore, presents a basic question as to whether there is any requirement for an evidentiary basis to support an award of substantial damages in an action brought under the District of Columbia wrongful death statute, Title 16-1201, District of Columbia Code (1961 Edition).

Before the trial commenced the trial court directed plaintiff's counsel to introduce all of his evidence on the issue of liability prior to introducing any evidence of damages. (J.A. 13) This instruction was withdrawn by the court shortly after the trial began. (J.A. 20) However, no evidence on the issue of damages was introduced thereafter except for a funeral bill in the amount of $723.40. Should this court sustain the jury verdict of $20,000, a very unsettling effort would be generated upon what have hitherto been considered to be well settled fundamental principles concerning plaintiff's burden of

proof in actions seeking damages for injury to various legal rights.

1. ***The prior decisions recognize the necessity for an evidentiary record on damages.***

Section 1201 provides that damages in a wrongful death case "shall be assessed with reference to the injury resulting from such act, neglect, or default causing such death to the spouse and next of kin of such deceased person." [7]

The statute does not make any provision for an award to the estate of decedent, for any mental anguish, loss of society, grief or for any other item which does not constitute pecuniary or financial loss to the next of kin.[8]

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[7] This language first appeared in the original District of Columbia wrongful death statute of 1885, Act of February 7, 1885, ch. 126, § 1, 23 Stat. 307, and has remained unchanged to the present time. In 1948 the statute was amended to its present form, Act of June 19, 1948, ch. 507, § 1, 62 Stat. 487. The provisions for the recovery of burial expenses and for reduction of excessive verdicts were added. The $10,000 limitation on the amount of recovery was deleted.

[8] See, *e.g.*, *Baltimore & P.R.R.* v. *Mackey*, 157 U.S. 72 (1895); *Baltimore & P.R.R.* v. *Golway*, 6 App. D.C. 143, 180-181 (1895); *United States Elec. Lighting Co.* v. *Sullivan*, 22 App. D.C. 115 (1903); *Smith* v. *Cissel*, 22 App. D.C. 318, 320 (1903); *Globe Furniture Co.* v. *Gately*, 51 App. D. C. 367, 279 Fed. 1005 (1922); *Ramsey* v. *Ross*, 66 App. D.C. 186, 85 F.2d 685 (1936); *Rankin* v. *Shayne Bros.*, 98 U.S. App. D.C. 214, 234 F.2d 35 (1956); *Tate* v. *Nelson*, 71 F. Supp. 465 (D.D.C. 1947); *Hord* v. *National Homeopathic Hosp.*, 102 F. Supp. 792 (D.D.C. 1952), *aff'd. per curiam*, 92 U.S. App. D.C. 204, 204 F.2d 397 (1953); *Brown* v. *Curtin & Johnson, Inc.*, 117 F. Supp. 830 (D.D.C. 1954), *aff'd. per curiam*, 95 U.S. App. D.C. 234, 221 F.2d 106 (1955).

Section 1201 of the District of Columbia Code is patterned after Lord Campbell's Act, 9 & 10 Vict., c.93 (1946), which provided that the jury might "give such damages as they may think proportioned to the injury resulting from such death" to the parties for whose benefit the action should be brought. The English courts very early decided that the only basis for damages under the Act was loss of reasonably expected pecuniary benefit from the continuance of decedent's life; nothing could be awarded for the

Plaintiff is not relieved of his evidentiary burden simply because there is no precise way to determine pecuniary loss to the next of kin and a certain amount of speculation is unavoidable in determining whether financial injury has accrued. Where damages are not precisely measureable, it is even more essential that a jury be given all of the guidance and assistance possible through the introduction of relevant evidence, so as to avoid a verdict based upon pure conjecture, speculation or other improper considerations not authorized by statute. A brief review of the decisions will demonstrate that the courts in the District of Columbia have always required plaintiff to establish the requisite pecuniary loss by the most accurate and comprehensive evidence reasonably obtainable under the circumstances in order that the dangers inherent in permitting a jury to base its consideration of damages upon sheer speculation and guess work will be diminished, and the public interest against excessive verdicts will be protected by due recognition of the permissible elements of compensation.

In *Rankin* v. *Shayne Bros.*, 98 U.S. App. D.C. 214, 215, 234 F.2d 35, 36 (1956), the court stated the measure of damages in the event of death of a minor to be:

> [Plaintiff] is entitled to recover the value of the child's services during the child's minority, that is, until the child reaches 21 years of age, had the child lived, and such further sum as a parent might prop-

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mental suffering and bereavement caused to the survivors by the death. See, *Blake* v. *Midland Ry.*, 18 Q.B. 93, 118 Eng. Rep. 35 (1852). See generally, Salmond, *Torts* § 94 (8th Ed. 1934).

For a good discussion of the historical development of wrongful death statutes and the damages recoverable thereunder, see generally 2 Harper-James, *Torts*, §§ 24.1-24.3, 25.13-25.18 (1956). See also Prosser, *Torts* § 105 (2d Ed. 1955). It is the general rule in this country that punitive damages are not recoverable under statutes modeled after Lord Campbell's Act. *Meehan* v. *Central R.R.*, 181 F. Supp. 594 (S.D.N.Y. 1960). See, *Baltimore & P.R.R.* v. *Golway*, *supra*.

erly have received from the deceased if the deceased had lived, less the cost that would have been incurred in bringing up the child.

In *Hord* v. *National Homeopathic Hosp.*, 102 F. Supp. 792 (D.D.C. 1952) *aff'd.*, 92 U.S. App. D.C. 204, 204 F.2d 397 (1953), plaintiff established a very substantial evidentiary record on the issue of damages. The decedent's mother testified that had her child lived, it would have assisted in the rendition of services to its parents, that since it was the youngest of four children, it would have helped more than the others and for a longer time, and that there was an atmosphere of love and affection in the home. The decedent's father testified as to his occupation and yearly salary, as to the educational background of himself and his wife, and as to their plans for the education of decedent; he stated that he was the sole support of his family and detailed the portion of his monthly expenditures for the family's food and clothing which would have been attributable to decedent; he testified as to certain personal physical failings and demonstrated that he would have been 66 years of age when the child reached majority so that he could reasonably have expected further contribution at that time and during his retirement. Mortality tables were introduced for the child, mother and father. (Brief for appellant, pp. 3-5; brief for appellee, p. 6, *Hord* v. *National Homeopathic Hosp., supra.*)

The court in the *Hord* case cited numerous authorities which support the rule that the jury must base its assessment of damages on proper consideration of the relevant evidentiary factors such as mortality tables of the deceased and of his parents, the age, feeble health, and poverty of the next of kin, the age and the physical and mental characteristics of the child, the position in life and earning capacity of its parents, and the conditions under which the child would probably have been reared and educated. In affirming the district court, this Court noted

that appellant urged that the jury should have been instructed to confine its verdict to out-of-pocket expenses actually incurred by the parents and did not ask this Court to reduce the verdict pursuant to the authority which this Court has under Title 16-1201.

In *Rankin* v. *Shayne Bros.*, *supra*, the plaintiff introduced evidence at trial as to the age and life expectancy of the parents and infant, the background and financial status, the nature of the household, the fact that the deceased was the first and only child at the time of the accident, his health, planned future education, probable cost of raising him had he survived, and evidence as to the parents expectation that the child would render them services. (Brief for appellee, p. 12, *Rankin* v. *Shayne Bros.*, *supra.*) This Court affirmed the trial court's instruction which in part stated:

> The amount of damages to be awarded must be based largely on the good sense and sound judgment of the jury, because this amount cannot be computed by any mathematical formula, and *the amount must be based upon all the facts and circumstances of the case involving such matters as the age of the child at the time of its death; the age and financial standing of the parents, the life expectancy of the child and of the parents under the mortality tables as of the date of the child's death, and similar considerations.* [Emphasis added.]

In *Globe Furniture Co.* v. *Gately*, 51 App. D.C. 367, 279 Fed. 1005 (1922), an action to recover for the wrongful death of a youth eight or nine years old, plaintiff introduced evidence as to the health and physical characteristics of the decedent, his level of schooling, intellectual development, his willingness to assist around the house and father's place of employment, nature of specific tasks performed, the father's occupation, age, and health, the amounts paid towards rent, maintenance and food for the family and the normal life expectancy of both decedent

and his father. (Brief for appellant pp. 2-3, Brief for appellee pp. 2-3, *Globe Furniture Co.* v. *Gately, supra.*)

In the first reported suit for the wrongful death of a minor in this jurisdiction, *United States Elec. Lighting Co.* v. *Sullivan*, 22 App. D.C. 115 (1903), plaintiff introduced evidence concerning the decedent's physical condition and characteristics; his father's poor physical condition and resultant deleterious effect on the conduct of the family business, the physical and financial assistance the decedent had contributed to the father in the past and the other children in the family. In affirming an award of $1,500 this Court stated at pages 137-138:

> [T]he charge of the court . . . must be approved as correct, and *applicable to the evidence*, which showed some pecuniary damage, the amount of which, uncertain as its ascertainment might be, was for the determination of the jury, subject to the supervising power of the trial justice in case of an excessive verdict. . . . The rule for the ascertainment of damages that has been approved clearly indicates the competency of the *evidence tending to show the age, feeble health, burdens, and poverty* of the father of deceased. . . . This was rightly admitted as affording some aid to the jury in determining the reasonable probability of the continuance of the contributions of the deceased during the life of the father . . . . Such evidence clearly inadmissible in ordinary actions for damages where it is calculated to arouse the sympathies of the jury *without furnishing any legal element of damage*, stands upon essentially different grounds when offered in a case like the present, brought under the statute. [Emphasis added.]

In *Baltimore & P.R.R.* v. *Mackey*, 157 U.S. 72 (1895), the Supreme Court upheld the following instruction:

> [M]anifestly, you cannot estimate in dollars and cents exactly what the damages are in a case of this kind, if there be any at all. That is not possible. But you may and you should take into consideration the age of the man, his health and strength, his

> capacity to earn money as you discover it *from the evidence*, his family—who they are and what they consist of—then, gentlemen, *from all the facts and all the circumstances*, make up your mind how much this family, if anything, probably will lose by his death, and that would be how much had this family a reasonable expectation of receiving. . . . [Emphasis added.] (157 U.S. at 92).

The consistent language in these opinions to the effect that proper evidence of all the circumstances must be considered, stems not only from the statute and the obvious intention of the legislature, but from necessity. In *Baltimore & P.R.R.* v. *Golway*, 6 App. D.C. 143 (1895), the court wisely observed that:

> The natural sympathies of juries likely to be excited in such [wrongful death] cases must be under some just and reasonable restraint. They should not be permitted to roam at will the whole field of speculation in the search for remote possibilities of damage that may be taken into account to swell the aggregate of their verdict. (at p. 178)

2. Plaintiff failed to meet the evidentiary requirement in the instant case.

In this case the administrator testified that he was the deceased youth's father, that the boy was seven and one-half years old and about to enter the third grade, and that he was bright, healthy, and mature for his age. This is all the evidence plaintiff chose to introduce which could conceivably give guidance to the jury on the issue of damages. Plaintiff's case obviously failed to furnish the legal elements of damages as prescribed by previous wrongful death decisions in this jurisdiction. For example, the jury did not know whether the decedent had a mother or even if he lived with his parents at the time of and prior to his death. There was no evidence of the employment or the income of the father. There was no evidence of decedent's parents' station in life, financial

condition, age or health. No evidence was introduced as to the cost of raising the decedent. The jury was not told whether the youth had any brothers or sisters. There was no testimony as to whether the decedent's relationship to his next of kin was such as to have imposed a particular moral obligation of support upon the decedent. The mortality tables were not introduced for the jury's information either of the decedent or of his parents. There was no evidence as to the present value of any recovery which should be awarded.[9] The jury was presented no evidence of the education of the decedent's parents or of their plans for his education and future. As a matter of fact, plaintiff completely failed to introduce evidence of any kind, even though it was readily available to him,[10]

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[9] It was recently held that $20,000 is the equivalent of $200,000 discounted to present worth. *Burch* v. *Gilbert*, 148 So. 2d 289 (Fla. App. 1963). Present worth of any pecuniary loss sustained is the only pertinent inquiry. *United States* v. *Guyer*, 218 F.2d 266, 268 (4th Cir. 1954); *Jennings* v. *United States*, 178 F. Supp. 516, 531 (D. Md. 1959), *rev'd on other grounds*, 291 F.2d 880 (4th Cir. 1961).

[10] For another case which is illustrative of the proper treatment to be accorded a plaintiff who fails to present any evidence on a vital issue, even though it is available to him, see *Galloway* v. *United States*, 319 U.S. 372 (1943). Plaintiff had the burden of establishing continuous disability under a contract of war risk insurance; however, he failed to present any evidence concerning a number of the years in question. The Supreme Court affirmed the trial court's grant of a directed verdict for defendant. At 386-387, the court noted that the failure to present evidence was not due to inability to secure proof and that the only reasonable conclusion was that petitioner had deliberately chosen: "to present no evidence or perhaps to withhold evidence readily available concerning this long interval, and to trust to the genius of expert medical inference and judicial laxity to bridge this canyon.

"In the circumstances exhibited, the former is not equal to the feat, and the latter will not permit it. No case has been cited and none has been found in which inference, however expert, has been permitted to make so broad a leap, and take the place of evidence which, according to all reason, must have been at hand. *To allow this would permit the substitution of inference, tenuous at best, not merely for evidence absent because impossible or difficult to*

upon which the jury could conceivably base an estimate as to what the probable pecuniary loss, if any, to the decedent's next of kin might be. There was little point for the trial judge to caution the jury to confine its award to the probable financial injury after the great measure of inference and presumption which the jury was compelled to take in order to find data to which they could apply the standard on damages.

3. *The decisions by Federal courts in other jurisdictions in wrongful death actions controlled by the pecuniary loss standard have also held that plaintiff must furnish an evidentiary record.*

In wrongful death actions controlled by statutes, both Federal and state, which limit damages to the pecuniary injury to the next of kin, the Federal courts in other jurisdictions have held that what constitutes fair and just compensation depends upon the facts in each case and that the main elements to be considered by the jury are: the age of the decedent, his health, habits, qualities, expectations of life and in life, earning ability, income, prospects of increases of income, the number, age, sex, situation and condition of those dependent upon him for support, and his disposition to support them well or otherwise.[11]

The Federal courts have clearly recognized in such cases[12] that substantial damages may not be awarded

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secure, but for evidence disclosed to be available and not produced. This would substitute speculation for proof." [Emphasis added.] [Footnote omitted.]

[11] See *Wade* v. *Rogala*, 270 F.2d 280, 285 (3d Cir. 1959); *Montellier* v. *United States*, 202 F. Supp. 384, 422 (E.D.N.Y. 1962) and cases cited therein; *Mechan* v. *Central R.R.*, 181 F. Supp. 594, 610 (S.D.N.Y. 1960) and cases cited therein; *Rogoc* v. *United States*, 173 F. Supp. 547 (S.D.N.Y. 1959).

[12] Of course, it is a basic principle that the burden rests upon the plaintiff to prove his damages by the preponderance of the evidence, see, *e.g.*, *Caputo* v. *United States*, 157 F. Supp. 568, 569

where plaintiff has failed to introduce sufficient evidence for the jury to ascertain whether pecuniary loss was, in fact, sustained by the next of kin. To illustrate, in an action under the Federal Tort Claims Act [13] for the death of a minor where damages were measured by pecuniary loss, the court stated:

> The law fixes the burden upon him who claims damages from another as a compensation for a pecuniary loss to furnish the facts necessary to ascertain the extent of his loss with reasonable certainty, and, failing in this, he is entitled to no more than nominal damages. (*Heath* v. *United States*, 85 F. Supp. 196, 202 (N.D. Ala. 1949))

Similarly, in an action under the Death on the High Seas Act [14] where recovery for wrongful death was limited to pecuniary loss, the court stated:

> Since pecuniary damages are involved, there must be evidence of the existence and extent thereof. There can be no recovery where resort must be had to speculation or conjecture for the purpose of determining whether damages were in fact sustained. (*First Nat'l. Bank* v. *National Airlines, Inc.*, 171 F. Supp. 528, 537 (S.D.N.Y. 1958), *aff'd*, 288 F.2d 621 (2d Cir. 1961), *cert. denied sub nom.; Kessler* v. *National Airlines, Inc.*, 368 U.S. 859 (1961)).

In *Meehan* v. *Central R.R.*, 181 F. Supp. 594 (S.D.N.Y. 1960), an action under a state wrongful death statute which limited recovery to pecuniary loss, the court indicated at 613 that it was of the opinion that "the verdicts of juries in this class of cases [wrongful death] as to damages should be based on facts shown by evidence, and

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(D.N.J. 1957), and that plaintiff must establish his damage by the best evidence reasonably obtainable, see, *e.g.*, *Mountain States Tel. & Tel. Co.* v. *Hinchcliff*, 204 F.2d 381, 383 n.6 (10th Cir. 1953) and cases cited therein.

[13] 28 U.S.C. § 1346.

[14] 46 U.S.C. § 761.

not on guesses or speculation or conjecture [quoting from an earlier federal case]." Finally, in a case where a state wrongful death statute was controlling, the court observed that:

> Increased costs of living to the [next of kin] . . . comfort, love, consolation, and affection to the bereft, the financial responsibility of the [party responsible for death], equal distribution of justice, or dictates of humanity would not warrant the court in finding a pecuniary loss where none is shown by the evidence. (*The Princess Sophia*, 35 F.2d 736, 740 (W.D. Wash. 1929)).[15]

4. ***The statutory basis for reduction of excessive verdicts.***

Congress recognized the danger that in cases under the District of Columbia's wrongful death statute the juries might not restrict recovery to probable pecuniary losses in exclusion of any award for punishment to the defendant, the death itself, mental anguish, loss of society, and other items held not to be compensable by the great weight of authority both in this jurisdiction and elsewhere, which has construed statutes patterned after Lord Campbell's Act.[16] Thus, it placed in the statute the unusual provision that empowers the trial judge or this Court to order a reduction of a verdict which is deemed

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[15] *Cf. De Vito* v. *United States*, 98 F. Supp. 88, 99-100 (E.D.N.Y. 1951). (Wrongful death verdict based upon relevant data presented by the evidence ought to prevail as opposed to award based upon speculation, guesswork, and probabilities.)

[16] See H.R. No. 2189, 80th Cong., 2d Sess. (1948), which states in part: "The purpose of this bill is to remove the maximum limitation, but safeguards the public interest by granting power to both the trial and appellate court to order reductions in the jury's verdict. This power has always been resident in the trial court, but the United States Court of Appeals for the District of Columbia has ruled that it did not have the power to order a reduction in the verdict."

excessive.[17] This, of course, means excessive under the evidence. There can be no question of the power of this Court to grant the relief sought by appellant. This case does not call into play the restrictive principles concerning appellate review of the trial court's refusal to order a new trial where the ground of the motion was the excessiveness of the damages awarded. Nor is it necessary to consider the appropriateness of a remittitur which would grant an election to the plaintiff either to accept a reduction or undergo a new trial.

5. *The verdict of $20,000 is excessive under a strict application of the pecuniary loss standard.*

Appellant is aware that the courts have stated that substantial damages may be awarded for the death of a minor. These pronouncements have assumed, of course, that the plaintiff in such cases has built an adequate evidentiary record composed of the various facts and circumstances concerning the deceased and his next of kin which have been held to be the necessary elements for the jury to consider in order to arrive at a reasonable estimate of the probable pecuniary loss suffered. Because of plaintiff's decision in the instant case not to introduce such evidence for the jury's guidance, any award beyond purely nominal damages must be considered excessive. However, there is certainly no basis for concluding that the decedent would have contributed a net sum of $20,000 to his father over and above the expenses his father would have incurred in rearing and educating the child. It seems unquestionable that "from a purely economic point of view the young child of today is a net liability to his par-

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[17] Section 1201 of Title 16, District of Columbia Code (1961 Edition) provides in part: "[I]f in a particular case the verdict is deemed excessive the trial justice or the United States Court of Appeals for the District of Columbia, on appeal of the cause, may order a reduction of the verdict. . . ."

ents." [18] With very few exceptions, the costs of raising a young child will exceed the value of any expectable services.[19] The great deprivation that accrues to the parents when their young child is killed is not pecuniary in nature. To disregard the statute and allow an award of substantial damages "is a fiction which simply conceals the fact that damages here are awarded for emotional distress under the guise of pecuniary loss." [20] It would seem that if the proper application of the pecuniary loss standard leads to results that are undesirable, the proper remedy is legislative change of the standard, not judicial disregard of it.

Because of the absence of evidence the trial court erred in submitting the issue of damages to the jury, erred in denying appellant's motion for new trial, and erred in denying appellant's motion for a reduction of verdict. Even if this Court should rule that substantial damages can be awarded a plaintiff who makes no attempt to introduce evidence showing an entitlement thereto, this Court should exercise its statutory authority under Title 16, Section 1201, District of Columbia Code (1961 Edition) to order a reduction of the $20,000 verdict which must be deemed excessive under the circumstances in this case.

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[18] Harper & James, *supra*, note 7, § 25.14 at 1330. See Jaffee, *Damages for Personal Injury: The Impact of Insurance*, 18 Law & Contemp. Prob. 219, 228 (1953).

[19] For current statistical data which support this conclusion, see generally Note, 54 Nw. U.L. Rev. 254 (1959); Comment, 22 U. Chi. L. Rev. 538 (1955).

[20] 2 Harper & James, *supra*, note 7, at 1331. See Prosser, *supra*, note 7, at 715.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed and remanded with instructions to enter judgment in appellant's favor. Alternatively, the judgment should be reversed with instructions to grant a new trial. The minimum relief to which appellant is entitled is reduction of the verdict.

Respectfully submitted,

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REPLY BRIEF OF APPELLANT

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,889

GULF OIL CORP.,

Appellant,

v.

ERNEST E. REED, as Administrator of the Estate of Dwight K. Reed, deceased,

Appellee.

Appeal from the United States District Court for the District of Columbia

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REPLY BRIEF OF APPELLANT

SUMMARY OF POINTS ON REBUTTAL

This reply brief is required solely by reason of the fact that appellee's brief contains recitations of evidence, assumptions of fact and conclusions which are inaccurate and unsupported in the record. Appellee attempts to substitute strained interpretation for evidence. His claim must fail upon fair and objective analysis of the testimony.

REBUTTAL STATEMENT

I. A Comparison of Appellee's Assertions and the Transcript of Record Will Clearly Demonstrate Their Inconsistency.

In his summary of argument appellee states that:

> . . . crucial evidence of the several young children, besides the minor decedent, standing at various points on the bridge in full and unobstructed view of the defendant's driver, in his direct path of travel for a straight stretch of road over the length of the 178 foot bridge, is not seriously challenged. (Appellee's brief p. 7)

Not only is this statement challenged, but appellant states that it is wrongful and inaccurate and that the factual statements and arguments to that effect which are contained in appellee's brief are contrived and unsupported by the evidence in this cause.

This is not merely a disagreement over the effect of testimony such as frequently occurs between opposing lawyers. Appellee's brief contains assertions to the effect that the evidence was that children were in the roadway as the truck approached, whereas, in fact, there is not a whit of testimony that anyone was in the northbound roadway so as to be visible to the oncoming truck driver until the dedecent ran out from his concealed position behind the wall when the truck was a very few feet away and the collision could not have been avoided.

Appellant would appreciate the opportunity to allude to some of the misstatements in appellee's brief and comment briefly upon them.

On page 3 appellee says " . . . Larry Brox, was standing in the middle of the bridge (J.A. 36) and also another boy, Robert Simpson, a tall boy, was playing there with them. (J.A. 36)" Actually the testimony was:

> And wasn't Robert Simpson also on the other side of the bridge when the accident happened? Think hard. A. I don't remember. (J.A. 36)
>
> * * * *
>
> Q. And the other boys came up with you, the boys we mentioned like Nathan Wood, and your brother and Karl? A. No, sir—I can't remember. (J.A. 37)
>
> * * * *
>
> Q. But they were there right before the accident around the bridge? A. I can't remember where they were. (J.A. 37)

On page 4 appellee says that Mr. Block drove 178 feet on the bridge during which time ". . . he did not see any of these three boys where the prior testimony had placed them. (J.A. 43)" This allegation obviously is calculated to create the impression that testimony was introduced to place boys in the northbound roadway or off to the side in a place where they should have been seen. Appellee does not cite record pages where any such testimony appears and cannot because the testimony was that the boys hid behind the wall until the truck was near, at which time the decedent said: "Watch me beat this car." (J.A. 34) and began his tragic death defying run. (J.A. 34, 35) The word "hid" is not used inadvisedly. The only boy witness admitted that just before the accident he hid behind the center wall—away from the truck. (J.A. 34-35)

On page 4 appellee alleges that there was ". . . abundant evidence of children playing and being on the bridge at the time in defendant driver's direct and unobstructed view for at least 178 feet before the collision with the minor decedent . . . ." This is inaccurate and unseemly in view of the fact that appellee attempted to establish such a contention during the entire course of the trial and well recognized his inability to do so.[1] It should be noted

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[1] The accident in this case occurred on August 23, 1960. As early as September 9, 1960 appellee knew what the witnesses would

that there is no joint appendix citation to support the questioned statement.

On page 6 appellee alleges that the failure of the witness Kincaid to see children was due to the fact that he was approaching in the southbound roadway, whereas the children were on the north roadway. There is no record citation for this statement and it is inaccurate and misleading. The evidence is that the decedent and his companions were hiding behind the center wall on the side of the southbound roadway. (J.A. 34-35) Exhibit 5 referred to is a photograph showing the northbound lane looking north, with the wall that the witness said he hid behind on the

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say with respect to how the accident happened and that no persons were visible to defendant's driver as he proceeded in the northbound roadway until immediately prior to impact. (Appellant's brief pp. 27-28) During the course of the trial appellee, nevertheless, persisted in an attempt to inject last clear chance considerations, however, the trial court properly ruled on several occasions that the doctrine was not applicable because there was no evidence that the driver could have avoided the accident after he was aware of the situation. The court correctly stated: "The only negligence charged against the defendant is exceeding the speed limit." (J.A. 51-56) The court also correctly excluded plaintiff's requested instruction number 5 which was to the effect that defendant's driver owed a greater duty because he was, or should have been, aware of the fact that children were in or near the roadway, stating: "I think No. 5 would apply if there was evidence that the driver saw children around. There is no evidence to that effect." (J.A. 49) and in denying plaintiff's request for a last clear chance instruction the trial court stated: "Now, if we had the driver's testimony and if we had some other witness who testified that the boy was 30 feet in front of the truck, I would instruct the jury on the last clear chance, but you have not got any such thing." (J.A. 53-54) and "Now, if there was evidence that there was an interval between the time that the boy started to run across the road and the impact, obviously, the doctrine of last clear chance would come into play . . . . you offered no evidence to justify an inference that at the last minute the driver might have avoided the accident." (J.A. 53) There was no confusion during the course of the trial as evidenced by the fact that near the end of appellee's cross-examination of the witness Larry Brox the court, sua sponte, injected the remark: "I think we have had that two or three times, he was behind the wall." (J.A. 39)

left side of the photograph, which portrays the center wall behind which is the southbound lane. (J.A. 34)

On page 6 appellee asserts that Officer Bramhall testified to the location and position of the children on the bridge. There is no record citation. Actually the contrary is the truth. Appellant attempted to have Officer Bramhall relate what the boys stated with reference to their positions at the time of the accident, but appellee objected (J.A. 25) and appellant urges this exclusion as a ground for reversal. (Appellant's brief pp. 27-30)

The objectionable and unsupportable factual assertions are repeated in appellee's summary of argument at pages 7 and 8:

> . . . several young children . . . standing . . . in full and unobstructed view of the defendant's driver, in his direct path . . . .
>
> * * * *
>
> . . . children of tender age standing at various points on the bridge and in the full and unobstructed view and direct path of defendant's driver. . . .
>
> * * * *
>
> . . . children, ranging from 7 to 9 years of age, standing at various points of the bridge at the time of the accident in defendant's full view and direct path, with one child at the south end of the bridge (the side from which the defendant's driver approached the bridge), another child standing on the same side as the decedent, near the decedent but in front of him.

Similar unsupported statements are made on pages 9, 10, 20 and 21 of appellee's brief. Appellant challenges appellee to demonstrate his good faith by citing evidence, in context, to support such statements when this case is argued on appeal.

Appellee also attempts to create the illusion that the accident happened on a playground street. He says there was a ". . . public playground equipped with all the usual

paraphernalia . . . ." from which two paths led to the bridge. (Appellee's brief pp. 2, 3) Actually the playground is down a considerable embankment to the east of the bridge on the railroad track level and there is no path leading to any crosswalk or place where it would be practical to cross the roadway. There is no evidence of a crosswalk near the bridge and no occasion for anyone to attempt to cross the street at that point. There are steps leading from the sidewalk which runs along the playground to the sidewalk which runs north and south, parallel to the roadway. (See exhibit D-1 and J.A. 46) There is also an underpass under the roadway, through which a street, a sidewalk, and railroad tracks pass, and if one should go through the underpass and up a bank between the bridge and a high chain link fence, one is able to reach the west side of the roadway. (See photographic exhibits P-2, P-5 and D-1, and J.A. 37) Moreover, a pedestrian would have a difficult time attempting to cross the roadway at a point near the north end of the center wall because he would be required to follow an illogical and erratic path. The five foot high wall on the west side of New Jersey Avenue extends a substantial distance further north than does the center wall (J.A. 30) so that the pedestrian for no apparent purpose would have to walk diagonally south in the southbound lane in order to get to the north end of the center wall from the west side of the bridge.

II. Appellee Apparently Concedes That This Case Must Be Reversed.[=]

The reason appellee finds it desirable to take liberties with the transcript becomes clear upon the analysis of the

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[=] Appellee attempts to justify the verdict by contending that there was evidence that the defendant's driver should have seen plaintiff's decedent in time to have avoided the accident. That issue was excluded by the trial court as a matter of law because of inadequate evidentiary support. (J.A. 49, 51, 53-54) If, as appellee admits, the issue is crucial and if it was not submitted to the jury, there is no alternative to reversal.

several cases cited by appellee in his brief at pages 10, 11, 12 and 13. Those cited by appellee as alleged support for his verdict and judgment in this case are either last clear chance cases or cases in which recovery was allowed because the defendant observed the danger in time to permit him to take steps to avoid the accident. In other words, the plaintiff recovered when defendant did something negligent which caused the accident after he had an opportunity to observe the pedestrian-plaintiff. Appellee then attempts to distinguish the cases relied upon by appellant by stating that they are not applicable here because in each there was no evidence which supported the conclusion that the defendant driver saw or should have seen children in the path of his automobile. Apparently appellee agrees with the state of authorities presented in appellant's brief, which is that recovery should not be permitted in this case because a fair reading of the transcript indicates that there is no evidence which would indicate that the defendant's driver had a reasonable opportunity to avoid the collision after he saw or should have seen plaintiff's decedent and because in this case the trial court refused to submit such a factual issue to the jury since it was not supported by evidence.

There were six witnesses called to testify; only three were on the scene at the time of the accident. Charles Kincaid testified that when he approached the scene he saw no one in and about the travelled portion of the roadway, except the plaintiff's decedent (J.A. 42) and that he saw the truck hit plaintiff's decedent instantaneously as he left the center of the street where the concrete wall was located. (J.A. 41-42) Harry Block testified that there were no children on the bridge in the northbound roadway as he approached the point of collision and that just as he approached the end of the center concrete wall he saw a boy run out from the wall right in front of his truck. (J.A. 43) Larry Brox, who was 7 at the time of the accident, gave a much more reliable statement to the police

officer on the scene of the accident before his recollection was dimmed by the passage of adolescent years, however, the trial court refused to permit that statement into evidence after objection from appellee. (J.A. 25, 26) However, the child did remember that he hid on the west side of the center wall just before the accident; and that plaintiff's decedent ran from behind that wall, across the northbound lane, after saying to his companions: "Watch me beat this car." (J.A. 34-35) Larry Brox said that his brother Otto was not on the bridge (J.A. 35); that Nathan Wood was leaning against the bridge near the place where plaintiff's decedent had been (J.A. 36); that he did not remember where Robert Simpson was at the time of the accident (J.A. 36); and that, except for Nathan Wood and plaintiff's decedent, he could not remember where the other boys were right before the accident. (J.A. 37)

No witness ever stated during the course of the trial that any person was on the northbound lane or in a position to be seen from the northbound lane prior to the time when plaintiff's decedent ran out from behind the center wall. In view of this testimony appellee cannot, consistently with any fair interpretation, maintain his stated position that there were ". . . children of tender age standing at various points on the bridge in full and unobstructed view of the defendant's driver . . . ." (Appellee's brief p. 7)

CONCLUSION

Appellee follows the same tactics of obfuscation in this Court as he did in the trial court, however, such arguments will not stand the test of rational and dispassionate examination and, therefore, must be rejected by this Court.

Respectfully submitted,

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